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HUMAN RIGHTS COMMITTEE

Thirty-eighth session

SUMMARY RECORD OF THE 962nd MEETING (CLOSED)

Held at Headquarters, New York,
on Monday, 26 March 1990, at 3 p.m.

Chairman: Mr. LALLAH

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Consideration of communications under the Optional Protocol to the Covenant (continued)

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N.B. This record is subject to correction. Participants wishing to submit corrections during the session of the Committee are asked to hand them, in typewritten form, to the Secretary of the Committee. A consolidated corrigendum of the summary records covering the closed meetings of the Committee will be issued shortly after the session.

90-55338 2410S (E)

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The meeting was called to order at 3.20 p.m.

CONSIDERATION OF COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE COVENANT (continued)

Communication No. 329/1988 (CCPR/C/WG/38/DR/329/1988)

1. Mrs. HIGGINS, speaking as Special Rapporteur for New Communications, said that the author, a Jamaican sentenced to a 12-year term for felonious wounding, claimed that he was innocent because he had been elsewhere at the time of the crime, evidence had been fabricated and the judge had misdirected the jury. For lack of funds, he had not filed for leave to appeal to the Privy Council, and a request for legal aid to the Jamaica Council for Human Rights had apparently remained unanswered. It appeared, however, that the author had not formally applied for legal aid under the Poor Prisoners' Defence Act. In response to the Working Group's request to the author for clarification about his efforts in the matter, the author had, in essence, only repeated his claim that the judge had misdirected the jury. The State party argued that the author had failed to exhaust local remedies. Since the author's claim related primarily to the alleged inadequacy of the trial judge's instructions to the jury and there was not sufficient evidence that the instructions had been clearly arbitrary and had amounted to a denial of justice, the Working Group recommended that the Committee should decide that the communication was inadmissible.

2. Mr. POCAR said that he was troubled by the statement in paragraph 5.2 of the decision proposed by the Working Group in document CCPR/C/WG/38/DR/329/1988 that the Committee did not have "sufficient" evidence for the author's claim, since in some countries insufficient evidence was grounds for acquittal. Indeed, paragraphs 2.3 and 3 seemed to indicate that there was no evidence at all. He proposed deleting the word "sufficient".

3. Ms. CHANET concurred, and said that she would go even further and avoid the use of the term "evidence", which seemed to imply that the Committee was taking a decision on the merits rather than on admissibility.

4. Mrs. HIGGINS said that the full file indicated in fact that the Committee had no evidence at all. The penultimate sentence of paragraph 5.2 could therefore be amended to read: "The Committee has no evidence that the trial judge's instructions suffered from such defects."

5. Mr. MYULLERSON said that he agreed with the Working Group's reasoning and findings in the case. He suggested, however, that article 2 of the Optional Protocol was applicable in cases of non-substantiation rather than article 3 as cited in paragraph 5.2 of the proposed decision.

6. Mr. MÖLLER (Representative of the Secretary-General) confirmed that it was the Committee's practice to attach insufficient substantiation or non-substantiation of a claim to article 2.

7. Mrs. HIGGINS said that the normal practice should be followed and suggested that the last sentence of paragraph 5.2 should be amended to read: "Accordingly, the communication is inadmissible as it raises no claim within the meaning of article 2 of the Optional Protocol."

8. Mr. POCAR asked where the headings were to be put in accordance with the new presentation for decisions recommended by the Working Group.

9. Mrs. HIGGINS explained that the Working Group was following a mixed practice at the current session and had not introduced the new presentation in all cases.

10. The CHAIRMAN said that, if he heard no objections, he would take it that the Committee wished to adopt the decision recommended by the Working Group, with the drafting amendments proposed by Mrs. Higgins.

11. It was so decided.

Communication No. 378/1989 (CCPR/C/WG/38/DR/378/1989)

12. Mrs. HIGGINS, speaking as Special Rapporteur for New Communications, said that the author, a Bangladeshi citizen currently serving a 16-year sentence for manslaughter in a Roman prison, stated that in an altercation with Bangladeshi thieves who had earlier stolen a suitcase and money belonging to himself and a business associate, one of the thieves had been injured, and that they had been convicted as a result of a "conspiracy" against them. She noted that since the conviction had been for manslaughter the thief had presumably died and that the last sentence of paragraph 2.1 of the proposed decision in document CCPR/C/WG/38/DR/378/1989 should be amended accordingly. Since the author had made no mention of an appeal against the sentence, the Working Group had concluded that domestic remedies had not been exhausted and that the communication was accordingly inadmissible. It would have been possible to reach the same decision on the basis of non-substantiation of the claim, but the Working Group had decided on balance to rely on the ground of local remedies.

13. The CHAIRMAN asked, in his personal capacity, whether both grounds could not have been adduced.

14. Mrs. HIGGINS replied that as a matter of logic that was impossible, for if a claim was unsubstantiated an author could not be blamed for not exhausting all remedies.

15. Mr. MYULLERSON said that in the case under consideration the substantiation was even weaker than in the prior case, and that rather than encouraging the author to resubmit the claim after exhausting all remedies, it would be better to declare it inadmissible on the grounds of non-substantiation under article 2 of the Optional Protocol.

16. Ms. CHANET concurred.

17. Mrs. HIGGINS said that she herself was sympathetic to that view and that the Working Group agreed that paragraph 3.2 of the proposed decision should be amended in the light of Mr. Myullerson's suggestion.

18. The CHAIRMAN said that, if he heard no objections, he would take it that the Committee wished to adopt the decision recommended by the Working Group, subject to the amendment suggested by Mr. Myullerson.

19. It was so decided.

Communication No. 167/1984 (CCPR/C/WG/38/DR/167/1984)

20. Mrs. HIGGINS, speaking as Chairman/Rapporteur of the Working Group on Communications, recalled that the case in question was a very difficult one with which the Committee had long been grappling. She referred the Committee to the note for the file prepared by the secretariat, summarizing for its convenience the narrative contained in paragraphs 1 to 28 in document CCPR/C/WG/38/DR/167/1984.

21. The author, Chief of a band of Canadian Indians, was basically alleging the denial of the right of the members of the Band to self-determination and their right to dispose freely of their natural wealth. He had claimed that although the Canadian Government, through the Indian Act of 1970 and Treaty 8 of 1899, had recognized the Band's right to continue its traditional way of life, its land had been expropriated for commercial exploration and destroyed, thus depriving the Band of its means of subsistence and its enjoyment of the right of self-determination; and, indeed, that the rapid destruction of its economic base and aboriginal way of life had already caused irreparable injury. The author had further claimed that the Government had deliberately used the domestic political and legal processes to thwart and delay all the Band's efforts to seek redress in order to allow the industrial development in the area to continue. The author had stated that the Band was not seeking from the Committee a territorial-rights decision but only that the Committee should assist it in attempting to convince the Government, first, that the Band's existence was seriously threatened and secondly, that Canada was responsible for the current state of affairs.

22. From the outset, the State party had denied the allegation of irreparable injury to the traditional way of life of the Band. It had submitted that the Band's claim was only one of a number of competing native claims in the area, but that effective redress in respect of the Band's claims was still available, both through the courts and through negotiations; and that, at any rate, article 1 of the Covenant, concerning the rights of people, could not be invoked under the Optional Protocol, which did not concern alleged violations of collective rights conferred upon peoples.

23. That was the state of affairs when the Committee had decided in July 1987 that the communication was admissible "in so far as it may raise issues under article 27 or other articles of the Covenant" - in other words, on the basis of the minority-rights aspect, not the self-determination aspect. Each of the parties had subsequently made a number of factual submissions, refuting each other's

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(Mrs. Higgins)

statements. The author had accused the State party of creating a devastating situation, in violation of articles 6 and 7 of the Covenant, and had claimed that the bias of the Canadian courts had frustrated the Band's efforts at protection, in violation of articles 14 (1) and 26; that the State party had permitted the destruction of the families and homes of Band members, in violation of article 17 and 23 (1); that the Band members had been robbed of the physical realm to which their religion attached, in violation of article 18 (1); and that all the preceding also constituted violations of article 2 (1) to (3) of the Covenant.

24. The State party had categorically rejected those allegations as unfounded and as an abuse of the right of submission. It had submitted that serious and genuine efforts had continued in early 1988 in order to engage representatives of the Band in negotiations, including an interim offer to set aside 25.4 square miles as reserve land for the Band, without prejudice to negotiations or any court actions; but that all those efforts had failed. The author, instead, had maintained that all but the 25.4 square miles of the Band's traditional land had been leased out in defiance of a request for interim measures of protection, in order to allow the construction of a pulp mill.

25. The Federal Government had in May 1988 initiated legal proceedings against both the Province of Alberta and the Band, in an effort to provide a common jurisdiction and thus enable it to meet its recognized obligations to the Band under Treaty 8. In the author's opinion, however, the sole purpose of that initiative had been to delay indefinitely the resolution of the land issues. He had further accused the State party of practising deceit in the media and dismissing advisers who recommended any resolution favourable to his people.

26. Following an agreement between the Provincial Government of Alberta and the Band in November 1988 to set aside 95 square miles of land for a reserve, negotiations had begun between the Federal Government and the Band on how to achieve land transfer and related issues. According to the State party, consensus had been reached on most issues, including Band membership, size of the reserve, community construction and delivery of programmes and services, although not on cash compensation, when the Band had withdrawn from the negotiations in January 1989. The formal offer presented at that time by the Federal Government had amounted to approximately 45 million dollars in benefits and programmes, in addition to the 95 square miles of reserve. The author, on the other hand, had charged that information from the State party was almost entirely untrue and described the Government's offer as nothing but an exercise in public relations.

27. While the State party conceded that the Band had suffered a historical inequity, it maintained that its formal offer would, if accepted, enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency, and would thus constitute an effective remedy. The major remaining point of contention, the request for compensation for alleged economic and other losses, could, according to the State party, be pursued in the courts, and it reiterated that its offer to the Band stood.

(Mrs. Higgins)

28. Regarding the State party's request that the Committee reconsider its decision on admissibility in so far as the claim raised issues under article 27 or other articles of the Covenant, the Working Group had not been persuaded that the road of litigation would have constituted an effective remedy within the meaning of article 5 (2) (b) of the Optional Protocol at a time when the Lubicon Lake Band had allegedly been at the brink of collapse. In the circumstances, it believed that the Committee should uphold its earlier decision on admissibility, stressing, however, that it did not accept the Band's declaration that it had ceased to recognize the jurisdiction of the Canadian courts.

29. Although couched in terms of alleged breaches of article 1 of the Covenant - and validly so in the opinion of the Working Group - there was no doubt that many of the claims presented raised issues also under article 27. The Working Group felt that the sweeping allegations concerning breaches of other articles of the Covenant (6, 7, 14 (1), 26, 17 and 23 (1)) should not be taken into account except in so far as they raised issues under article 27.

30. The Lubicon Lake Band case, it should be noted, was now at the merits stage, so that it was not a question of the normal exhaustion of remedies. The Working Group viewed the remedy proposed by the State party, in its standing offer of January 1989 to the Band, as a serious effort at redress, within the meaning of article 2 of the Covenant and article 4 (2) of the Optional Protocol. Accordingly, the Working Group recommended that the Committee should find that the facts before it disclosed that there had been a violation of the provisions of article 27 of the Covenant, which the State party had offered to rectify.

31. Since the secretariat's summary of the narrative in paragraphs 1 to 28 of the proposed view in document CCPR/C/WG/38/DR/167/1984 brought out the main issues so usefully, she suggested that it might be incorporated into the text of the view.

32. She also proposed amending the wording, however, of paragraph 30.1 of document CCPR/C/WG/38/DR/167/1984, replacing the phrase "had not been impressed by" with the phrase "did not accept".

33. The CHAIRMAN, speaking in his personal capacity, said that the summary of the narrative could follow paragraph 28.4 and could be preceded by a heading, which would read "Summary of submissions and issues". The summary of the narrative would become paragraph 29, and the subsequent paragraphs would be renumbered accordingly.

34. Although the heading above paragraph 31.1 referred to alleged violations of article 1 of the Covenant, paragraph 31.2 mentioned several other articles. He therefore suggested that the heading be reworded to read "Articles of the Covenant alleged to have been violated".

35. He did not understand the point of paragraph 31.3. If it meant that the State party was fabricating a competing claim in order to defeat the claim made by the Band, perhaps the sentence contained in paragraph 31.3 should be inserted after the first sentence of paragraph 31.1, in which case the words "In this connection," should be inserted at the beginning of the sentence in paragraph 31.3.

(The Chairman)

36. The Committee should state in paragraph 31 that it had found the State party to be in violation of article 27. As it was, the Committee mentioned the violation only in connection with the State party's proposal of a remedy in paragraph 32. Another possibility was to mention the violation at the beginning of paragraph 32, in which case the heading above that paragraph could be amended to read "Violation and the remedy offered".

37. Ms. CHANET said that perhaps paragraph 32 could be divided into two, and the Committee could mention the violation of article 27 in one paragraph and the State party's offer to remedy the situation in another. She wished to know whether the Committee had dealt with similar cases involving article 4 of the Optional Protocol. It seemed to her that the Committee would be discouraging State parties from making reparations in connection with future claims, because States parties would think that, if they made reparations, the Committee would assume that there had been a violation of an article of the Covenant.

38. Mr. MÖLLER said that there had been no previous cases in which the State party itself, in a submission under article 4 (2) of the Optional Protocol, had acknowledged that there had been a violation and had informed the Committee of its remedy for that violation.

39. Mr. MYULLERSON said that, if the Committee wished to say that the State party had violated article 27, it should indicate what rights of the Band had been violated and specify the provisions which had been violated under article 27. The Committee could point out that Canada was already taking measures to redress previous grievances. Further, the Committee should indicate whether it agreed with the author's complaint that the construction of a pulp mill violated their rights under the Covenant. Perhaps the Committee could say that the acts of the State had, in the past, wronged the members of the Band and had endangered the cultural rights of its members, and that, unless the State party redressed the situation, it would be found to be in violation of article 27.

40. Mr. NDIAYE said that, in the last line of paragraph 29, the phrase "have been less than helpful" was inappropriate and might delay a settlement. In the next to last sentence of paragraph 30.1, the phrase "has not been impressed" should be deleted; perhaps the sentence could be reworded to read: "In doing so, the Committee stresses, however, that it has not deemed the declaration of the Lubicon Lake Band rejecting the jurisdiction of Canadian courts to be relevant".

41. In paragraph 30.2, the Committee had not responded to the State party's contention that the Committee had been remiss in its task. In the last sentence it would be more appropriate to state: "While the authors' claims had been confusing at times, they had been presented in a manner which had been clear enough to convince the Committee".

42. In paragraph 31.1, the Committee had stated that the representative of the Band had been freely chosen, although he seemed to remember that the State party - and the Committee itself - had questioned the authority of that representative to speak on behalf of the Band.

(Mr. Ndiaye)

43. In paragraph 32, he found it difficult to accept the Committee's reference to the State Party's violation of the Covenant after having concluded that the State Party was willing to remedy the situation and thus to fulfil its obligations under the Covenant. The State had proposed compensation in land and in money for its transfer of property of the Band to another person, and he did not understand why the Committee should separate the acts of compensation from the act of transfer by introducing an alleged violation of article 27.

44. Mr. POCAR said that the meaning of the last two sentences of paragraph 30.1 was not clear. He requested the Working Group to explain why the Committee should have discontinued consideration of the communication had it been impressed by the declaration of the Band. With regard to the same paragraph, he did not see the need for the Committee to repeat information contained in its earlier decision on admissibility.

45. In paragraph 32, the Committee said that there had been a violation and implied that the remedy offered by the State party was appropriate. Thus, the Committee had decided that a violation no longer existed, since the remedy had been judged effective and sufficient. He proposed that the Committee should state that there had been a violation and that the remedy had been deemed appropriate, and it should add another paragraph stating that, in the light of the foregoing, the Committee would discontinue its consideration of the case.

46. In the first sentence of paragraph 32, the words "wrongs of the past" seemed inappropriate, since the Indians had only relatively recently come into direct contact with non-Indian society.

47. Mr. DIMITRIJEVIĆ said that he agreed with Mr. Ndiaye that the wording of the last sentence of paragraph 29 was not appropriate and he considered, like Mr. Pocar, that the end of paragraph 30.1 was unclear. He suggested that, at the beginning of paragraph 32, the Committee could say that the fundamental change in the circumstances under which the members of the Band had been made to live amounted to a violation of their rights under article 27, which had been recognized by the State party. The first sentence of the paragraph should be omitted. The Committee should then go on to say that the State party had offered an appropriate remedy. The final sentence referring to a violation of article 27 should be deleted and, at the end of the paragraph, the Committee should state that it would be prepared to evaluate the success of the remedy if a further claim was submitted.

48. He stressed the fact that paragraph 31.3 was also an innovation. It was the first time that the Committee had dismissed a claim because of abuse of the right of submission. It should be added, however, that that was in accordance with article 3 of the Optional Protocol. He agreed with Mr. Pocar that paragraph 31 should be shorter. The Committee should not make any clear-cut finding but merely say that a violation existed and that efforts were being made to correct it. The Committee should therefore concentrate on redrafting paragraph 32.

49. Mr. WENNERGREN said that there were insufficient grounds for finding a violation. The State party, in a submission, had not acknowledged any violation and had provided a chart detailing the case and indicating what it was prepared to offer the alleged victims. The case should be dealt with in the light of article 4 of the Optional Protocol because negotiations were under way and a remedy appeared to be available. What was alleged would not be a violation if the claimant accepted the State party's offer. The State party had also referred to the failure to use court action as a domestic remedy, and he felt that that reasoning was correct. In sum, the communication was inadmissible because the remedy referred to in article 4 of the Optional Protocol was available and the author had failed to use domestic remedies in response to the State party's offer. The Committee could not intervene in the negotiations taking place and was in no position to judge the merits of the case better than the Court of Appeal of Alberta and the Supreme Court of Canada, which had found no irreparable injury.

50. The CHAIRMAN questioned the wisdom of reversing the decision on admissibility and the relevance of article 4 of the Optional Protocol. The author had stopped at the stage of an interim injunction, and had not gone further. It was not clear if the author's court action referred to the broader concerns of article 27 as opposed to narrower ones.

51. Mr. EL-SHAFEI drew attention to paragraph 29 and said he could see no purpose in it because it merely referred to and described difficulties that one normally encountered. It should therefore be omitted. He then drew attention to paragraph 30.1 and pointed out that the delays referred to were not simply the result of recourse to the courts but rather were due to the fact that the Committee did not deal with the case while the Band and the State party were in the process of negotiating. The Committee should therefore state that the delay was also due to, and necessitated by, the fact that the Band and the State party were negotiating towards an amicable solution. The paragraph was fragmented in its reasoning and should be redrafted.

52. Mrs. HIGGINS, speaking as Chairman/Rapporteur of the Working Group on Communications, said in reply to the comments that in paragraph 29 the purpose of referring to the factual setting was to show that that case depended more than most on who was telling the truth and that the Committee was not equipped to determine that. The last sentence of the paragraph should have been omitted.

53. In paragraph 30.1 she agreed that a sentence could be inserted to show that the delays were caused by the negotiations. Turning to the middle of the paragraph she said it was true that the court cases had dealt only with interim relief, that negotiations were under way and that the courts would not provide specific relief, but agreed that greater clarity was desirable. The last two sentences should be deleted.

54. The second sentence of paragraph 30.2 should specify that the problem had been set out with enough clarity to permit the State party and the Committee to address the issues on the merits. In the decision on admissibility, the Working Group had said that article 27 was in fact the heart of the case, but it was not customary to specify other articles.

(Mrs. Higgins)

55. Turning to paragraph 31.1, she said she agreed that the whole paragraph was superfluous and should be omitted. The new heading should then read "Articles of the Covenant that have been violated".

56. There seem to be general agreement on paragraph 31.2. On paragraph 31.3 she said that perhaps it would be clearer to refer to "alleged claims". She agreed that the sentence should make specific reference to article 3 of the Optional Protocol.

57. She agreed that the heading preceding paragraph 32 should read "Violations and the remedy offered". The Working Group had been divided on paragraph 32. The finding of the violation was based upon facts and what the State party said, and not just on the question of exhaustion of available remedies. The State party denied any violation of article 27 but admitted to a "historical inequity". One could therefore not simply refer to a historical remedy, and she suggested that the paragraph should conclude with the following wording: "Historical inequities, to which the State party refers and which threaten the way of life and culture of the Lubicon Lake Band, constitute a violation of article 27 as long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate." She could also accept the following as the final sentence: "Accordingly, the Human Rights Committee discontinues this communication".

58. The CHAIRMAN said that a distinction must be made between the violation and the nature of the remedy, which must also take historical violations into account. The reference to historical inequities was therefore acceptable.

59. Mr. ANDO said that it should be made clear that the State party conceded only a historical inequity and not a violation.

60. Mr. WAKO said he felt that the paragraph should include a reference to recent developments as well as historical inequities. The original accusation by the author had been that, despite the Indian Act of 1970, the Government of the State party had allowed a provincial government to usurp the rights of the Band, and the State party had recognized the justice of that claim as recently as 1987 by agreeing to negotiate a settlement.

61. Mr. WENNERGREN said that the issue of whether or not the historical inequities referred to really threatened the way of life of the claimants remained open. The courts had been unable to find that any irreparable harm threatened the way of life and culture of the claimants; how, then, could the Committee? In his view, the Committee must rely in its decision on the question of the exhaustion of legal remedies.

62. The CHAIRMAN said that the Committee must choose between basing its decision on the question of inadmissibility or on the merits of the case. If Mr. Wennergren really thought that the legal remedies had not been exhausted it might be necessary for him to write a separate opinion.

63. Mr. DIMITRIJEVIĆ said that the case involved a clash of values. One view held that money could compensate for anything, but that was obviously not the view of the author.

64. He agreed that the otherwise satisfactory new wording proposed by Mrs. Higgins should include a reference to recent developments.

65. He now felt that paragraph 31.1 should be retained, as otherwise the Committee would seem to be ruling out any submission by individuals.

66. Mr. POCAR supported the new text of paragraph 32 proposed by Mrs. Higgins, with the addition of a reference to recent developments. The Committee might also restore the reference to article 2 of the Covenant.

67. He agreed that the substance of paragraph 31.1 might be retained but suggested that it be moved to paragraph 30.1.

68. The CHAIRMAN said he felt that the Committee would be confusing two separate issues if it included paragraph 31.1 in paragraph 30.1.

69. Mr. WAKO suggested that, in order to help in the negotiations, the Committee might say in its revised text that the State party had made constructive proposals in good faith.

70. Mrs. HIGGINS, speaking as Chairman/Rapporteur of the Working Group on Communications, said she agreed that paragraph 31.1 should be deleted. She felt that most members of the Committee agreed that reference could be made to appropriate remedies and hoped Mr. Wako would drop his objection on that point. She agreed that a reference to recent developments should be included in the redrafted paragraph 32, and proposed that the following new wording should be adopted:

> "Historical inequities, to which the State party refers, and certain more recent developments, threaten the way of life and culture of the Lubicon Lake Band and constitute a violation of article 27 so long as they continue."

71. She would then propose, as the second sentence of paragraph 32, the following: "The State party proposes to rectify the situation by a remedy that this Committee deems appropriate within the meaning of article 4 (2) of the Optional Protocol."

72. Mr. POCAR said his suggestion had been to refer to article 2 of the Covenant, rather than article 4 (2) of the Optional Protocol, which was merely procedural in nature.

73. Mr. NDIAYE said that he found the new text of paragraph 32 acceptable. He suggested, however, that the Committee should refer to more recent "decisions" rather than "developments".

74. Mrs. HIGGINS, speaking as Chairman/Rapporteur of the Working Group on Communications, said that the substitution of a reference to article 2 of the Covenant for the reference to article 4 (2) of the Optional Protocol was acceptable to her. She would also propose the addition of a new sentence at the beginning of paragraph 31.1, under the heading "Articles of the Covenant alleged to be violated", which would read:

> "The question has arisen of whether any claim under article 1 of the Covenant remains, the Committee's decision on inadmissibility notwithstanding."

75. With those changes and additions, she thought that the Committee would have achieved a consensus on the text of its decision.

76. The CHAIRMAN thanked the Committee for its in-depth discussion, which had enabled it to complete a task which had taken it six years.

77. The recommended decision, as revised, was adopted.

The meeting rose at 6 p.m.

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Thirty-eighth session

SUMMARY RECORD OF THE 963rd MEETING

Held at Headquarters, New York,
on Tuesday, 27 March 1990, at 10 a.m.

Chairman: Mr. LALLAH

CONTENTS

Consideration of reports submitted by States parties under article 40 of the Covenant (continued)

Third periodic report of the Federal Republic of Germany

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, Department of Conference Services, room DC2-750, 2 United Nations Plaza.

Any corrections to the records of the public meetings of the Committee at this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 10.15 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (continued)

Third periodic report of the Federal Republic of Germany (CCPR/C/52/Add.3)

1. At the invitation of the Chairman, Mr. Meyer-Ladewig took a seat at the Committee table.

2. Mr. MEYER-LADEWIG (Federal Republic of Germany) said that in the Federal Republic of Germany, human rights were protected within the framework afforded by the free, democratic basic order, established by the Basic Law and further developed by the judgements of the Federal Constitutional Court. Human rights were enshrined in the Constitution, and, as directly applicable law, were binding upon the legislature, the executive and the courts. The commitment, made in article 1 of the Basic Law, to human rights as the basis of every community and of justice and peace in the world, also demonstrated the specifically international dimension of human rights protection in the Federal Republic of Germany.

3. Because of the dark chapter in its history, the Government was aware that its espousal of human rights throughout the world could only be credible and effective if its own order was free, tolerant, just and committed to the supremacy of law. World-wide support and strengthening of human rights was among its main foreign policy initiatives, as violations had effects reaching far beyond national frontiers in the increasingly interdependent world.

4. His Government had pursued an active treaty policy since the examination of the second periodic report. It had taken several initiatives towards world-wide abolition of the death penalty. Capital punishment was abolished in the Federal Republic of Germany in 1949 by virtue of article 102 of the Basic Law. The sixth protocol to the European Convention on Human Rights, abolishing the death penalty, had entered into force in the Federal Republic of Germany in August 1989. The Government had put forward a Second Optional Protocol to the Covenant on Civil and Political Rights inviting commitment under international law to the abolition of capital punishment, which had been adopted at the forty-fourth session of the General Assembly, after long years of effort. His Government had also ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Prevention of Torture, and had been actively involved in the preparation of the Convention on the Rights of the Child.

5. His Government had decided not to ratify the Optional Protocol to the Covenant, as the system of legal redress it contemplated fell far short of that provided in the European Convention on Human Rights. A ratification of the Optional Protocol would not produce a gain as regarded legal redress for individuals claiming violations.

(Mr. Meyer-Ladewig, Federal Republic of Germany)

6. The opening of the internal German border on 9 November 1989 was now leading to the coalescence of the parts of the German nation into one State, which demonstrated in unparalleled fashion the right of peoples to self-determination as guaranteed in the Covenant. That right did not apply only to decolonization, and held the solution to the German question. A fundamental improvement in human rights standards had been achieved by the fact that citizens of the German Democratic Republic were no longer living behind walls and barbed wire fences, but were able - free from bureaucratic restrictions - to make use of their human right to freedom of movement. Moreover, freedom of opinion and information, guaranteed freedom of assembly and association, together with the institution of genuine, unfalsified elections, were being realized. Every day since the beginning of the year, several thousands had moved across the border from the German Democratic Republic to settle in the Federal Republic of Germany - 58,000 in January alone. That migratory movement had created serious problems for the Federal Republic of Germany, which was now faced with the task of providing decent accommodation and jobs for an unexpected number of persons.

7. The developments of recent months in Central and Eastern Europe fully justified the resolute championing of human rights and their implementation. The Human Rights Committee and all other such bodies deserved recognition and thanks for the role they had played.

8. The CHAIRMAN read out section I of the list of issues to be taken up concerning the third periodic report of the Federal Republic of Germany.

Constitutional and legal framework within which the Covenant is implemented (article 2 (2) and (3) of the Covenant (section I of the list of issues)

9. Mr. MEYER-LADEWIG (Federal Republic of Germany) said that court judgements rarely referred to the Covenant, as Basic Law already contained the same provisions. It was invoked in some cases where it raised the possibility of additional rights. Thirteen such decisions, from the Federal Constitutional, Supreme, Administrative and Finance Courts had been handed down since 1981. They had often concerned the rights of aliens and their family members and those seeking political asylum. For example, the Federal Constitutional Court had ruled in 1987 that the regulations in effect regarding the spouses of aliens were not in violation of articles 17 (1) and 23 (1) of the Covenant, which were similar to article 8 of the European Convention on Human Rights.

10. Mr. POCAR asked for further information on the status of the Covenant in the domestic legal system and its position in the hierarchy of law. It appeared that the Constitutional Court used the Covenant and the European Convention as ways of interpreting the Constitution, rather than as laws to be directly applied. Referring to paragraph 7 of the report (CCPR/C/52/Add.3), he wondered whether the Constitutional Court made use of Human Rights Committee decisions in interpretation of laws, as well as the "jurisprudence" of the European Commission of Human Rights and the European Court of Human Rights.

(Mr. Pocar)

11. The Government of the Federal Republic of Germany had decided not to ratify the Optional Protocol to the Covenant. However, he wondered if the European Convention on Human Rights covered exactly the same ground and offered every possible protection. Other member States represented on the European Court had also ratified the Optional Protocol, believing that it would enhance their human rights safeguards.

12. Ms. CHANET said that she would like to know what was meant specifically by civil rights for Germans alone, as mentioned in paragraph 5 of the periodic report. She would also welcome more information on article 18 of the Basic Law regarding the status of a person who had forfeited basic rights. Turning to paragraph 8, she noted that the European Court in Luxembourg had little power over human rights matters.

13. She would welcome clarification concerning the meaning of "internal and external" self-determination, and how the Government envisaged the application of the Covenant in the course of the reunification process.

14. The rights guaranteed under Basic Law were almost identical with those under the Covenant, but where they differed, she wished to know how those rights were protected. For example, article 27 of the Covenant had no equivalent in the European Convention on Human Rights or in Basic Law. Perhaps the provisions of the Optional Protocol would fill those gaps.

15. Mrs. HIGGINS said that it was her understanding that the Government's decision for the immediate future was not to ratify the Optional Protocol because it fell short of the protections offered by the European Convention. However, there were rights under the Covenant that were not in the European Convention, for example, articles 25, 26 and 27. She wondered whether citizens had any means of redress without ratification of the Optional Protocol, since much of the case law of countries that had ratified it fell into the area covered by those articles.

16. With respect to self-determination, she wished to know if it was intended that a further range of choices be offered citizens concerning reunification and political choice, or if the process would go forward based on the results of the recent elections. Referring to paragraph 52 of the report, she asked for comments on the implications of financing by political parties of one State of the political parties of another during a period of elections, and whether there were any historical circumstances that might justify consulting a neighbouring State about procedures for self-determination, and not just about issues of territory that might affect it.

17. Finally, she would welcome information on how the relationship between self-determination and other duties and obligations under international instruments was perceived, for example, the protection of minorities.

18. Mr. FODOR said that the report, in setting high standards, could serve as a model for other States.

19. Under article 19 (4) of the Basic Law, any person whose rights were violated by public authority had recourse to the courts. He wished to know to what extent that provision was applied in practice. Did it imply that any decision made by a public authority that affected the rights of an individual could be challenged before the courts, irrespective of the nature and gravity of the case?

20. While decisions of the Federal Constitutional Court were binding on the constitutional bodies of the Federal Government, the Laender and all courts and authorities, the state governments seemed to function autonomously, particularly in matters relating to law enforcement in the courts. Additional information on the relationship between the decisions of the highest federal courts of justice and those of the Laender courts would be welcome. Article 95 of the Basic Law provided for a Joint Panel of the highest federal courts of justice charged with preserving uniformity of jurisdiction. He would appreciate information on other means available for that purpose.

21. Mr. PRADO VALLEJO said that the report and presentation by the representative of the Federal Republic of Germany had demonstrated that country's commitment to respect the provisions of the International Covenant. It was clear that the reporting State had the appropriate system and machinery for the defence of human rights in its territory.

22. He welcomed the report's affirmation of the right of peoples to self-determination. In that connection, he hoped that the Federal Republic would more actively defend that right on the international level, particularly in Latin America.

23. He expressed gratification about the changes taking place in Europe, in particular, the reunification of Germany; they would contribute to the consolidation of human rights.

24. When the International Covenant had been ratified by a particular country, its public authorities and federated states were under an obligation to implement the provisions. In that connection, it would be useful to learn how legislative uniformity was ensured in the Federal Republic of Germany; more specifically, what happened in the event that local laws conflicted with federal legislation.

25. The Committee would welcome additional information on how the Government expected to ensure the protection of human rights, as provided for under international law, following the reunification of Germany. Were any special measures under consideration?

26. Mr. EL-SHAFEI said that the reporting State should clarify its plans for implementing the provisions of the International Covenant in Germany after reunification. He would also appreciate a more detailed explanation of the reasoning which had led to the decision not to ratify the Optional Protocol.

(Mr. El-Shafei)

27. He welcomed the section of the report dealing with "external" and "internal" self-determination. The discussion of such issues would assist the Committee in formulating its own comments on the International Covenant.

28. Mr. MYULLERSON said that, in marked contrast to the majority of reports submitted to the Committee, the third report of the Federal Republic of Germany cited judicial decisions and relevant statistics. That information was very valuable and its inclusion in the report was commendable.

29. With respect to the role of the Federal Constitutional Court in monitoring domestic legislation and practice, he wished to know whether that Court reviewed domestic legislation to ensure that it was in conformity with international human rights obligations.

30. Article 100 (2) of the Basic Law provided that, in the event of doubt regarding the applicability by a court of a rule of public international law, that court should seek a ruling from the Federal Constitutional Court. Additional information on that procedure would be welcome. Specifically, the role of the Constitutional Court in relation to the application of international treaty provisions should be clarified.

31. Under article 20 (4) of the Basic Law, all Germans had the right to resist any person or persons seeking to abolish the constitutional order, if no other remedy was possible. The reporting State should clarify exactly what was meant by the phrase "right to resist". How was that right implemented in practice and had any court cases been brought under article 20 (4)?

32. He associated himself with the question raised by Mrs. Higgins concerning self-determination. He would welcome further information on how the unification of Germany would affect the existing treaties between the Federal Republic of Germany and the German Democratic Republic, especially treaties concerning border issues.

33. Mr. ANDO said that the reporting State should be more specific about the relationship between public international law and its federal law. Article 25 of the Basic Law provided that the general rules of public international law would take precedence over federal laws. In that connection, he wished to know whether public international law included treaty law.

34. He wondered to what extent the people of the Federal Republic of Germany were aware of the contents of the third periodic report and the discussion taking place in the Human Rights Committee.

35. With respect to the Optional Protocol, he wished to know whether there had been any change in policy since the statement made during the Committee's consideration of the second periodic report.

36. Mr. AGUILAR said that further information on the application of article 20 (4) of the Basic Law would be appreciated. In view of the current political situation, he wondered what would happen if the majority of the people were to decide to change the constitutional system. What method was available for ensuring compliance with the will of the majority?

37. Under article 1 (3) of the Basic Law, the legislative, executive and judicial branches were bound by certain basic rights. It was unclear whether those rights were also binding at the level of the local courts.

38. More information on the compatibility of international law, in particular international treaty law, with federal and local legislation was needed. Under article 21 of the Basic Law, certain political parties were considered to be unconstitutional. He wondered whether that article had been applied to any of the neo-Nazi groups which had had a recent resurgence. Did application of that article imply a violation of certain rights of political party members, such as the rights of free association and free assembly?

39. He wished to echo the concerns expressed by his colleagues with respect to the State party's position on the Optional Protocol.

40. Mr. WENNERGREN said that the reporting State should provide examples from the case law of the Federal Constitutional Court concerning the application of article 18 of the Basic Law (forfeiture of basic rights).

41. Article 19 (2) of the Basic Law, which dealt with the restriction of basic rights, stated that "In no case may the essential content of a basic right be encroached upon". Under the International Covenant, the scope of the restriction of basic rights was limited to the protection of specific public interests, such as safety or public order. Therefore, he wished to know whether the more limited scope of the Covenant would take precedence over the scope of article 19. The meaning of the term "essential content" was not entirely clear.

42. Mr. DIMITRIJEVIC expressed satisfaction with the ample information provided in the report in response to the questions raised by the Committee during the consideration of the Federal Republic's second periodic report. To a certain extent, however, the current report had already been overtaken by the fast-moving events in Europe. In that connection, the Committee would like to know the State party's position on the implementation of the right to self-determination as part of the unification process. Would unification be effected under the existing Basic Law or through a referendum to be held on that question?

43. He inquired whether international law took precedence over domestic law in the Federal Republic of Germany. The State party seemed to hold the view that by adhering to the European Convention for the Protection of Human Rights it was fulfilling its obligations under the Covenant. The Covenant, however, was broader than the European Convention, particularly with regard to discrimination. It would be interesting to know whether courts in the State party could look into instances of hidden discrimination, especially based on sex, by referring to the Covenant.

(Mr. Dimitrijević)

Lastly, the reporting State should inform the Committee whether under article 25 of the Basic Law, international treaty law constituted the supreme law to be respected throughout the country.

44. Mr. WAKO expressed appreciation of the third periodic report because it provided specific answers to the questions raised during the consideration of the second report. He was concerned at the reasons given for not ratifying the Optional Protocol. The scope of the Covenant was much broader than that of the European Convention for the Protection of Human Rights. Furthermore, ratification of the Optional Protocol would further expand the range of remedies available to victims of human rights violations. The provisions of article 13 of the Covenant, for example, were not reflected in the European Convention. The rights of immigrant workers under the Covenant would have to be taken into consideration. Perhaps during the unification process, the Government of the Federal Republic of Germany would reconsider the question of ratifying the Optional Protocol. The Committee would appreciate further information on why the State party felt that ratification was unnecessary.

45. The Covenant safeguarded the right to self-determination. In that connection, he inquired whether unification would take place in accordance with the Basic Law or through a referendum. It would be interesting to know to what extent the report had been publicized in the Federal Republic of Germany. Lastly, he inquired how the State party's concern for human rights was reflected in its bilateral relations with countries, particularly with regard to human rights violations.

46. Mr. NDIAYE expressed satisfaction with the third periodic report, which was in keeping with the Committee's guidelines and provided precise answers to the questions raised during the consideration of the previous report. In view of the fast pace of change in Europe, he wondered whether the protection of human rights and fundamental freedoms, particularly in respect of minority groups, would be affected by the process of unification through self-determination.

47. The CHAIRMAN, speaking in his personal capacity, pointed out that to date there were 90 States parties to the Covenant, of which 49 had ratified the Optional Protocol. He inquired in what respect redress under the Optional Protocol fell far short of that provided under that of the European Convention for the Protection of Human Rights.

48. Mr. MEYER-LADEWIG (Federal Republic of Germany) said that his country's decision not to ratify the Optional Protocol was not final; the question of ratification was still under consideration. Many of the new ideas and new developments generated in the context of the changes in East-West relations might have an impact on his country's position in that regard. Under the European Convention for the Protection of Human Rights, the procedure for dealing with a complaint against a State party was carried out through the courts of the country concerned, the European Commission of Human Rights and the European Court of Human Rights. Pleas were entered and evidence was obtained from witnesses. The final decision was directly binding and compensation was awarded if it was determined

(Mr. Meyer-Ladewig, Federal Republic of Germany)

that there had been a violation of the Convention. That procedure, which was different from the approach followed under the Covenant, was based on a regional human rights defence system and was more effective.

49. Although it was true that the European Convention did not cover all the rights set forth in the Covenant, the rights established in the Convention and the relevant jurisprudence had been further developed by the bodies that functioned under that system. The European Court of Human Rights had reviewed legal procedures in the Federal Republic of Germany and was effective in protecting human rights in that regard. Although article 26 of the Covenant was broader, article 3 of the Basic Law also provided a general prohibition against discrimination. The European Convention prohibited discrimination only with regard to the rights it established.

50. International legal obligations under the Covenant were binding on his Government and all persons representing the State. The question whether a citizen could invoke provisions of the Covenant to support a claim in a court of law had not yet been clearly resolved. As a general principle, domestic legislation had to be in conformity with the Covenant in all areas. Where that was not the case, the law in question must be changed. Through ratification, an international instrument such as the Covenant was integrated into domestic law and was therefore binding. Although treaty law was not on a par with constitutional law, it was enforced through the constitutional jurisdiction: in interpreting domestic law, international legal obligations had to be taken into consideration. Article 25 of the Basic Law was somewhat unclear on that point. It essentially related to generally accepted and applied rules of international law, not specific bilateral or multilateral obligations under international law. Some decisions taken by the Committee were published in a European legal journal dealing with European legal practice. The journal was available in German and Committee decisions could be involved in domestic legal actions.

51. With regard to the legal provisions regarding aliens, he said that there were some laws, such as those relating to human rights, which applied to everyone, while others, mainly those with a strong political flavour, concerned the specific rights of German citizens. Articles 8 and 9 of the Basic Law were examples of the latter. It was generally agreed that only citizens should have the right to vote and, although at the regional level some questions might arise in that regard, at the level of federal and state parliaments, only citizens had the right to vote.

52. A question had been raised as to whether article 18 of the Basic Law, on forfeiture of basic rights, was generally applied. As far as he knew, it was not a provision that played a major role; it might be applied in isolated cases, but he was not aware of any such specific case. With regard to the protection of human rights in the European Convention and by the European Court in Luxembourg, the position of the Government of the Federal Republic of Germany was that upon joining the European Community, it had passed on some of its sovereignty in certain areas in which the European Court in Luxembourg had jurisdiction.

(Mr. Meyer-Ladewig, Federal Republic of Germany)

53. The question of what might happen in the event that the two German republics were to be reunified was difficult to answer, since developments were taking place at such a fast pace that any reply might be overtaken by events. It was a matter of waiting to see what happened and in which direction the German Democratic Republic wished to go. As he saw it, there were two possibilities. One might be that article 23 of the Basic Law, which provided for the possibility that other parts of Germany might wish to join the Federal Republic, would apply. Individual states belonging to the German Democratic Republic, or the entire German Democratic Republic, might decide to join the Federal Republic. A second possibility might be that since it could not be assumed that the Basic Law would automatically be transferred to a reunified Germany, the question would have to be resolved through negotiations. In the case of the Saarland, for example, the decision to join the Federal Republic and submit to the Basic Law had followed a year of negotiations. The question might arise as to whether the Basic Law itself might be in danger, but it was apparent that the population of the German Democratic Republic was committed to upholding human rights as they existed in the Federal Republic of Germany. The Federal Republic could also learn from the German Democratic Republic, and in some cases might be willing to make changes on the basis of the experience gained in the German Democratic Republic, especially in the area of social legislation and collective activities.

54. With respect to the question of international obligations if the two States were to be reunited, there were treaties which both countries had signed, but there were others that had not been ratified by both Governments. All those questions would have to be dealt with. There was no difficulty in the case of the Covenant, because it had been ratified by both States.

55. He welcomed the comments that had been made regarding self-determination, which applied not only in cases of decolonization but within countries as well. There would be special problems bearing on the German question, but it was primarily for the population of the German Democratic Republic to decide how they would approach reunification.

56. The question of the financing of political parties from outside the borders of the Federal Republic had been widely discussed, but the right of the people of the German Democratic Republic to self-determination had not been influenced by outside financing. The various political parties that had emerged in that country had encountered difficulties in the new situation, since they lacked organization and experience, and needed help from the West. The United Nations itself had provided assistance in similar situations in many parts of the world.

57. With regard to the intent of article 19 (4) of the Basic Law and the exceptions to privacy of posts and telecommunications provided for in article 10 (2) of the Basic Law, he said that what was envisaged, essentially, was the protection of authorities and officers and the security of the armed forces and intelligence services in cases of threats and dangers to the Federal Republic of Germany and to the troops of the North Atlantic Treaty Organization (NATO). Those measures were applied only in very serious cases and the decision had to be made by

(Mr. Meyer-Ladewig, Federal Republic of Germany)

the Federal Minister responsible for the area and a commission made up of five people appointed by Parliament. The person concerned had to be informed of the decision, and could appeal to a court to determine whether the measure was legal or illegal.

58. Turning to the question concerning the unified jurisprudence of federal and state courts, he said that if there had been a violation of federal law by state laws, the question had to be submitted to the constitutional court; that was also the case if a new state law was to be enacted that conflicted with federal law. The purpose of article 59 of the Basic Law, was to safeguard the jurisprudence of the various courts, with the highest court being responsible for constitutional matters. The obligations assumed in international treaties had to be observed, but there was a certain latitude permitted in application. In cases of differing interpretations or decisions, recourse could be had to the higher courts. If a ruling of a state court actually violated an international treaty, the constitutional court could decide that it was not admissible.

59. Replying to the question on article 20 (4) of the Basic Law concerning the right to resist any person or persons seeking to abolish the constitutional order, he said that it had to be understood against the national socialist historical background of Germany; there had been cases where strict obedience to the law had led to violations of basic human rights and fundamental freedoms. The article provided that the right to resist was to be exercised "should no other remedy be possible". Some resistance groups justified their actions by referring to that article, but it could not be understood as allowing anyone to overturn freely that which had been achieved by a majority decision.

60. Article 19 (2) of the Basic Law stated that in no case might the essential content of a basic right be encroached upon. The difficulty lay in defining what "essential content" meant and which basic right was at issue. Limitations had to be interpreted. The law itself interfered with basic rights only when necessary to carry out a protective function. The right to protect the Basic Law had to be upheld. When the Government of the Federal Republic had ratified the Covenant, they had tried to find out if the law regarding the statute of limitations was compatible with the Covenant, and had found that it was in full agreement with it. New laws were also in conformity with the Covenant.

61. There was no conflict between the Covenant and the Basic Law limitations as far as minorities were concerned. There was only one minority in the Federal Republic of Germany, namely, the Danish minority. The concept of "minority" did not apply to aliens. As yet, there was no unified opinion as to what constituted a minority, but in general it could be considered to be a limited group of people of the same origin who formed a part of the population, lived in a certain area, and were also citizens of the country. That definition did not extend to migrant workers and others. Therefore, the Basic Law was in line with article 27 of the Covenant.

(Mr. Meyer-Ladewig, Federal Republic of Germany)

62. Replying to the question of how much publicity had been given to the consideration by the Human Rights Committee of the periodic report of the Federal Republic of Germany, he said that the Government had issued a brochure and had published special advertisements so that the public would have free access to the information it contained. However, no official announcement had been made of the fact that the Government representatives would be discussing these matters with the Committee.

63. The protection of human rights in bilateral relations was an essential part of his Government's foreign policy. The Charter of the United Nations and other international treaties imposed an obligation to safeguard human rights in the country's international dialogue. Much of the activity in the area of human rights was carried out in collaboration with the 12 member countries of the European Community.

64. Mrs. HIGGINS said that she wished to clarify the method of work followed by the Committee in respect of issues arising under the Optional Protocol. Under the Committee's system, both parties were heard and the Committee issued a written and fully reasoned decision in each case. Its decisions were not of a binding nature, and hence were perhaps weaker than those handed down under the European system, but it should be noted that some States parties chose to make the Committee's decisions binding.

65. There seemed to be some misunderstanding regarding the non-discrimination provisions of the Covenant; article 2 of the Covenant corresponded to article 14 of the European Convention, but in article 26, the Covenant went farther than the European instrument. She had some difficulty understanding the assertion of the representative of the Federal Republic that there was only one minority in the country, namely the Danish minority. The Federal Republic of Germany had not entered any reservation to article 27 of the Covenant, which referred to the rights of ethnic, religious or linguistic minorities. Yet, with a Christian majority in the Federal Republic, surely the Jewish population would be considered a minority.

66. Mr. MEYER-LADEWIG (Federal Republic of Germany) said that the different procedures followed under the Covenant and the European Convention raised a difficult question. His Government's position could change in time, as the issue would probably come up again in Parliament.

67. Mr. STOCKER (Federal Republic of Germany) said that when his Government was considering the possibility of ratifying the Covenant on Civil and Political Rights, it had considered the scope of the articles, including the article on minorities. It had given careful study to the deliberations that preceded the drafting of the Covenant. With regard to minorities, document A/2929, which reproduced all the considerations put forward in the elaboration of the first draft, clearly showed that, despite the multiplicity of minorities, article 27 of the Covenant referred to ethnic groups which had resided in a State for a long time. Although the Convention on the Elimination of Discrimination clearly stated that everyone had the right to vote, in international law, it was generally granted that foreigners did not have that right.

The meeting rose at 1 p.m.

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Thirty-eighth session

SUMMARY RECORD OF THE 964th MEETING

Held at Headquarters, New York,
on Tuesday, 27 March 1990, at 3 p.m.

Chairman: Mr. DIMITRIJEVIĆ (Vice-Chairman)

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Any corrections to the records of the public meetings of the Committee at this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

In the absence of the Chairman, Mr. Dimitrijević, Vice-Chairman, took the Chair.

The meeting was called to order at 3.15 p.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (continued)

Third periodic report of the Federal Republic of Germany (CCPR/C/52/Add.3) (continued)

1. At the invitation of the Chairman, Mr. Meyer-Ladewig and Mr. Stöcker (Federal Republic of Germany) took places at the Committee table.

Constitutional and legal framework within which the Covenant is implemented (articles 2 (2) and (3) of the Covenant) (section I of the list of issues (continued)

2. The CHAIRMAN asked if there were any other questions or comments on section I.

3. Mr. NDIAYE asked what the relationship was between the 1919 Weimar Constitution and the Basic Law of the Federal Republic of Germany.

4. Mr. STÖCKER (Federal Republic of Germany) said that some elements of the 1919 Constitution had been incorporated into the Basic Law and were now an integral part of it.

Non-discrimination and equality of the sexes (articles 2 (1), 3 and 25 of the Covenant) (section II of the list of issues)

5. The CHAIRMAN read out the question under section II concerning the respects in which the rights of aliens were restricted as compared with those of citizens and as between foreign nationals from the member States of the European Community and other States.

6. Mr. STÖCKER (Federal Republic of Germany) said that in general all the human rights provisions of the Basic Law were applicable to aliens, with the exception of the right to vote in state or federal elections. In practice, however, the treatment of aliens varied somewhat among the different states of the Federal Republic. Aliens had a right to all the social bensfits extended to citizens, except that the welfare payments available to aliens who were applicants for asylum or who had been ordered to leave the country were somewhat reduced. Aliens who were permanent residents of the country had the same rights as citizens but in certain cases their freedom of movement could be restricted and they could be denied residence permits for certain areas. Applicants for asylum were required to remain within the jurisdiction of the authorities to which they had been assigned and could also be directed to live in specific places.

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7. The purpose of that provision was to distribute the large number of applicants for asylum more equitably among the states and to equalize the cost to the states of providing services for them. They could not accept work for five years, but that restriction was lifted if asylum was granted. Aliens from the European Community enjoyed freedom of movement and employment but certain conditions were attached to those rights.

8. The CHAIRMAN invited questions or comments from the Committee on section II of the list of issues.

9. Mr. PRADO VALLEJO asked whether any restrictions were now or had ever been placed on the freedom of movement of gypsies. Moreover, noting that it appeared from paragraph 78 of the report that a sort of confinement existed for aliens and from paragraph 80 that a sort of discrimination against citizens and in favour of aliens existed, he asked what recourse was available to individuals to whom the provisions described in those paragraphs were applied. He would also like more information on how decisions concerning the issuance of passports or travel documents for citizens and aliens were made, whether aliens could be forced to remain in the country indefinitely, what recourse was available to individuals who were not permitted to leave the country and on what grounds the decision that individuals endangered the internal security of the Federal Republic was made.

10. He would also welcome further clarification of the situation with regard to discrimination against individuals, particularly aliens, by private enterprises.

11. Ms. CHANET asked for more information on the criteria used to determine when restrictions on the freedom of movement of aliens in order to avoid "ghettoization" were justified and what the conditions were under which the freedom of movement of European Community residents could be restricted.

12. Mrs. HIGGINS asked under what articles of the Covenant the restrictions imposed on freedom of movement, the withholding of passports, and the limitation of social payments were justified.

13. Mr. ANDO noted that article 3 of the Basic Law enumerated most but not all of the rights covered by the Covenant and asked for further clarification of that discrepancy.

14. Mr. STÖCKER (Federal Republic of Germany), replying to the questions put by Mr. Prado Vallejo, said that gypsies were treated like all other aliens in the Federal Republic. In the past, potential differences of treatment had arisen in two states, where state authorities had planned to expel gypsies because they did not have the necessary residence authorizations, but solutions had been found under the laws of the states concerned. Differences had also arisen in the past because the gypsies were migrants, and had to be assigned places where they could camp which they did not always consider satisfactory, but those cases had also been resolved. With respect to the denial of passports or travel documents, both citizens and aliens had the right to appeal to administrative courts on various levels. Comparisons between the treatment of citizens and aliens were difficult to

(Mr. Stöcker, Federal Republic of Germany)

make because the rules applicable to the two categories were different; however, any question of discriminatory treatment could be put before an independent court, which would make the final decision.

15. It was not possible to invoke the rights guaranteed by the Basic Law in the event of discrimination by private individuals, although in some cases for example, discrimination against women, legislation existed to prevent it and corrective action against other forms of discrimination was possible by legal means.

16. In connection with the criteria applied by the authorities to limit alien residence, he explained that in some industrial areas aliens constituted up to 50 per cent of the population. Such concentrations created social problems, however, and an effort was therefore made to keep the proportion of alien residents to a level which would not endanger public order.

17. Restrictions on the freedom of movement of citizens of the European Community could only be applied for reasons of health; merely economic reasons were specifically excluded.

18. Replying to Mr. Ando's question, he said that there was no discrepancy between the Basic Law and the Covenant; the rights enumerated in the first three articles of the Basic Law were not exhaustive.

Treatment of prisoners and other detainees (articles 7, 9 and 10 of the Covenant) (section III of the list of issues)

19. The CHAIRMAN read out section III of the list of issues, namely: (a) legal or administrative procedures guaranteeing prompt and impartial investigations of alleged violations of article 7 of the Covenant, and information regarding any such allegations during the period under review and the outcome of any investigations; (b) information about the treatment of prisoners under anti-terrorist legislation; (c) information as to whether the continuing need to apply security measures in prison was best under review in individual cases and whether there had been instances of the transfer to open prisons of prisoners housed in specially secured blocks; (d) a description of the circumstances of the release of any other prisoners on grounds of "the restrictions imposed by considerations of human dignity" (para. 64 of the report); (e) information on detention in institutions other than prisons (such as psychiatric institutions) and for reasons other than crimes; (f) the reasons for the recent extension of the maximum period of preventive detention.

20. Mr. STÖCKER (Federal Republic of Germany), referring to section III (a) of the list of issues, said that in a development related to article 7, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment would go into effect in his country in 1990. Under that Convention, it would be bound to conduct an impartial investigation as soon as there was any suspicion of an act of torture, which was considered a criminal act. In the Federal Republic of Germany it would be the task of the Federal Prosecutor to conduct such a necessarily impartial investigation, to decide if charges should be brought, and either to free

(Mr. Stöcker, Federal Republic of Germany)

the suspect or to make an arrest under the Criminal Code. Should the Federal Prosecutor be unwilling to prosecute, a superior court could order him to act.

21. As to whether there had been any allegations of torture, the answer was both yes and no: no, because there was no specific penal regulation against torture under the law of the Federal Republic, it having been decided at the time of the ratification of the United Nations Convention against Torture that it was not necessary to enact one since the penal regulations covering corporal violations by officials and forced confessions protected victims much more comprehensively than did article 1 of that Convention. While there were thus no reported cases of torture as such, there had been one case in 1988 of a forced confession, and 155 allegations brought of corporal violations by officials: 54 of the accused had been acquitted, 64 of the cases had been dismissed, and 37 officials had been sentenced. None of the cases had been spectacular, and in instances where the sentences were for less than one year, the public officials could, like all civil servants be punished by disciplinary measures instead.

22. With reference to section III (b) of the list of issues, the treatment of convicted terrorists in prison was regulated by section 129 of the Criminal Code, which applied to all members of organizations whose purpose or activities were directed towards precisely defined criminal acts such as murder, kidnapping, hostage-taking or the use of explosives. The matter had been discussed several times before, both in his Government's earlier reports to the Committee and statements in the Committee.

23. He read out sections of a 1989 report by a Special Rapporteur of the United Nations Commission on Human Rights (E/CN.4/1990/17, paras. 13-14) who had met with representatives of the Ministry of Justice to investigate charges that the detention régime in the Federal Republic of Germany amounted to torture or inhuman treatment, particularly in cases of solitary confinement. The Special Rapporteur had been given detailed information on each of the 25 prisoners who were still considered a danger and therefore came under special security measures, and on the Federal Republic's efforts to make life as humane as possible for them. He had been informed that conditions were not as charged: the prisoners had not been restricted to total isolation but they themselves had chosen not to mingle at specified times with common criminals; they had been given radios and cassette players, they had contacts with their lawyers and could carry on correspondence subject to censorship. A special provision under the penal procedures for imprisonment on remand applied to those sentenced under section 129 of the Criminal Code: because of past bad experience with the defence counsels of such prisoners, all their correspondence was supervised and would be returned to the sender if he refused such supervision. The supervision of correspondence, however, was limited by law in the case of prisoners held in an open prison or those with special privileges.

24. A prisoner could not permanently be cut off from his rights. The aim of the Federal Republic's penal system was to enable all prisoners to lead a crime-free life in future. Some former terrorists had in fact disavowed terrorism and been transferred to minimum-security prisons. The fact remained that the general penal

(Mr. Stöcker, Federal Republic of Germany)

regulations must leave room for special security measures in particularly dangerous cases. In some of the German Laender, certain terrorist prisoners were held in maximum-security prisons while others were held in mixed-security prisons.

25. Regarding section III (c), the Code of Criminal Procedure in sections 6 and 7 laid down the rules for executing the sentences of prisoners who posed a special security danger. It was stipulated that they could be held in minimum or maximum security, in groups with others or in special treatment groups; the kind of work or vocational training they would engage in was regulated, as were the special treatment measures, the possible easing of sentences and the preparations for their release.

26. All such provisions were to be worked out according to the prisoner's state of development and the results of psychological testing. Such prisoners were periodically re-examined and, as indicated in the report (para. 46), some were already being held under minimum-security conditions. The prisoners could always bring a complaint to the Federal Constitutional Court or the European Court of Human Rights. Furthermore, when the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment took effect in the Federal Republic on 1 June 1990, the Commission for the Prevention of Torture to be established under it would be able to inspect the conditions of all prisoners being held under section 129 of the Criminal Code.

27. With reference to section III (d), he had no knowledge of any release of prisoners other than the Nazi criminal who had been released in his old age. Under section 57 of the Criminal Code, it was for the Federal Constitutional Court to set the precedents according to which the age of a prisoner would be a factor for release. As of 31 March 1988, only 21 persons older than 70 had been serving life sentences in prisons in the Federal Republic.

28. With reference to section III (e), there were times when the mentally ill had to be confined in restricted sections of psychiatric hospitals by court order at the behest of their relatives; the police were also empowered to take a decision on commitment to psychiatric hospitals. Article 104 of the Basic Law provided that the liberty of the individual could be restricted only under a formal law and only by decision of a judge as to the length of time a person could be held in a closed institution. Section 1631 (b) of the Civil Code set out the federal legislation in the matter. Cases of psychiatric hospitalization by decision of the police, however, were in all 11 Laender subject to state law, which regulated police power. Such laws were very specific about the rights of the patients involved, the Commitment Law of the State of Bavaria being a case in point. Also, the Commission to be established under the European Convention for the Prevention of Torture would be able to inspect both prisons and psychiatric hospitals.

29. Section III (f) of the list of issues concerned only Bavaria. The laws of all the Laender governing police power included the right of the police to prevent a danger to public safety or public order. Bavaria had enacted a particular provision giving the police the right to make an arrest if it was indispensable to

(Mr. Stöcker, Federal Republic of Germany)

prevent the commission of a dangerous criminal act, thus giving the police the power to decide what a judge usually decided.

30. Since 1978 it was mandatory by law to inform persons of the reasons for their arrest and of their rights, to allow them to inform their families, to keep them in separate detention from sentenced and remanded prisoners, and to release them the following day if no charges were brought. In Bavaria, however, those rules had not always been scrupulously enforced, and the time limits for release after arrest had not always been respected. Bavaria had therefore changed its police laws, making the length of preventive detention a judicial decision, but limiting it in any case to one week. Constitutional experts, however, were challenging that provision and it would soon be tested in the Federal Constitutional Court.

31. Mr. FODOR noted that the Federal Republic had rejected as unfounded the charges that terrorist criminals were being subjected to inhumane solitary confinement (para. 41 of the report), but had acknowledged (para. 44 of the report) that a few particularly dangerous prisoners were housed in specially secured blocks, sometimes apart from other prisoners. Whether that constituted torture or inhuman or degrading treatment depended on the length of the solitary confinement and on the application of the United Nations Standard Minimum Rules for the Treatment of Prisoners. He wondered whether section 89 of the 1976 Prison Act, setting the maximum length of solitary confinement at three months - a period which could be considered excessive especially if uninterrupted - was still in force. He would also like to know what limitations could be put on the applicability of the United Nations Standard Minimum Rules in the case of prisoners in solitary confinement and under heavy security. He had been pleased to learn that prisoners under preventive detention had to be read their rights at the time of their arrest. However, were such persons brought promptly before a judge and could they communicate with legal counsel of their own choice, and when and for how long could such communication with counsel be restricted?

32. Ms. CHANET asked for further information about pacification cells, where deranged prisoners could be tied down. Also, she wondered whether prisoners under tight security were strip-searched systematically each time they met another person, which could amount to 14 to 15 times per day. Furthermore, was testing for AIDS obligatory in prisons?

33. Regarding the imprisonment of juveniles on remand (para. 71 of the report), the practice of preventive detention in order to remove them from an environment that encouraged crime seemed to be counter to article 9 of the Covenant. She wondered whether juveniles in custody on remand were separated from adults and what was the average length of such detention; and also whether there were preventive educational measures of some other kind to help young people avoid crime.

34. Mr. PRADO VALLEJO said that, although the Basic Law of the Federal Republic of Germany recognized the rights of conscientious objectors, he had heard that such persons were sometimes considered to be deserters and were punished for insubordination. There had even been reports that conscientious objectors had been

(Mr. Prado Vallejo)

imprisoned, and he requested the delegation of the Federal Republic of Germany to comment on such treatment.

35. Persons accused of terrorism in the Federal Republic of Germany had been tried and sentenced very harshly. They had been subjected to long periods of solitary confinement which, as was well known, could cause psychological problems. There had been reports that individuals accused of terrorism had not been allowed outside of prison buildings for months on end and had been denied contact with other prisoners. When prisoners accused of being terrorists had fallen ill, they had not been allowed to be treated by doctors of their choice. He wished to know whether those allegations had been investigated. In addition, there had been claims of police abuse and brutality, and he inquired what had been done to prevent such excesses.

36. Remand in custody for more than a year was hardly a provisional measure. When it went on for such a long time, it could become an abuse, and he wished to know whether any action had been taken to ensure that the period of remand in custody would be suitably short.

37. Mr. POCAR inquired whether the existing legislation of the Federal Republic covered all the situations referred to in article 7 of the Covenant or only those mentioned in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He referred, in particular, to the protection of persons who were not arrested or imprisoned, such as students at educational establishments or patients at medical institutions, as well as people who were punished in some way for exceeding their official functions. There had been reports that private hospitals in the Federal Republic had carried out a series of operations using organs of children bought in developing countries. He wished to know whether that report was true and, if so, whether there had been an investigation.

38. He requested additional information about imprisonment on remand which lasted for more than one year. He considered that compensation of 20 deutsche marks for each day of deprivation of liberty was not a very large sum. Referring to the first sentence of paragraph 74 he wished to know what were the "other requirements" which could authorize imprisonment on remand.

39. Mrs. HIGGINS wished to know what instructions were given to the police about use of the powers under the General Law on Security and Order, and whether an individual held in preventive detention was always able to appeal for a review of his case in order to determine whether there were allegations relating specifically to him rather than to persons taken into preventive detention because they belonged to a group of potentially violent demonstrators.

40. Mr. WENNERGREN wished to know the status of imprisoned terrorists with respect to that of other prisoners. Since long periods of solitary confinement could result in sensory deprivation and mental disturbances, he inquired whether there were any provisions for the adequate medical treatment of prisoners with mental disorders, and whether there had been any cases of prisoners being transferred to psychiatric hospitals.

(Mr. Wennergren)

41. Article 9 of the Covenant stated that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge". Since there was a hazy borderline between pre-trial detention, which referred to criminal charges, and preventive detention, which referred to offences which might have developed into criminal actions, he wondered whether it could be considered acceptable that a person was detained for 48 hours without being brought before a judge.

42. He inquired whether a person with a contagious disease, such as AIDS, could be detained if he was spreading his disease to other people. He wished to know who would be responsible for authorizing such a detention, and whether the detainee would have recourse to a judge. He also requested information regarding the place and duration of such detention. Finally, he asked whether a person with a contagious disease could be given treatment without his consent.

43. Mr. STÖCKER (Federal Republic of Germany) replied that a prisoner who had been accused or found guilty of terrorism had the right to take his case to court and to other human rights bodies. In recent years, the authorities had endeavoured to improve the conditions and treatment of prisoners accused of terrorism, and had permitted them to have contacts with other prisoners. However, terrorists did not consider themselves ordinary prisoners but prisoners of war, and believed that they were entitled to a special kind of detention which would underscore their status. For example, terrorists had engaged in hunger strikes in order to be placed together. The penal authorities were reluctant to place all prisoners of that kind together, since prisoners who wished to abandon terrorism might be persuaded to continue their activities. Prisoners accused of terrorism were placed in special sections of prisons and were provided with a room where they could spend time together. They were allowed to have books and electronic equipment in their cells.

44. The Federal Republic of Germany had rejected the accusation that prison authorities tortured prisoners and sought to induce mental aberrations in them. While prisoners were allowed to receive visitors, the number of defence attorneys available to each prisoner had been reduced to three. That measure had been taken after the authorities had discovered that some prisoners had engaged as many as 15 defence attorneys in order to prolong their cases.

45. He hoped that there would be no cases of torture other than those which had been brought before the European Commission of Human Rights. In accordance with the Federal Republic's new policy with respect to prisoners accused of terrorism, the State penal authorities had endeavoured to make detention centres accessible to the German press so that people could see for themselves the comfortable conditions in which such prisoners lived. However, in spite of the efforts of the authorities, such prisoners would always find people to take up their cause.

46. Mr. MEYER-LADEWIG (Federal Republic of Germany) said that the authorities were taking measures to protect the health of prisoners sentenced to solitary confinement. There would always be cases in which some prisoners would be sentenced to solitary confinement, which was very often ordered by a judge. However, prisoners were never completely isolated, and were allowed to have a radio

(Mr. Meyer-Ladewig, Federal Republic of Germany)

and to see a defence attorney as well as other visitors. Prisoners accused of terrorism now had contacts with other convicted terrorists, as well as with other prisoners.

47. The use of pacification cells, which contained very few objects which could be destroyed, was only provisional and was intended to protect both prisoners and prison furniture. Individual searches were carried out on prisoners in order to prevent the passing of objects from visitors to prisoners. Prisoners were permitted to hold free and unmonitored conversations with defence attorneys; however, such conversations took place behind glass partitions. AIDS testing was not required. Preventive detention for young people averaged 2.7 months, but that figure would be reduced under pending legislation.

48. On the point raised by Mr. Prado Vallejo, he said that his Government was corresponding with Amnesty International and had itself investigated the matter without finding any human rights violation. Conscientious objectors were not treated like deserters or exposed to bad conditions. Under the law, military service could be refused for reasons of conscience as well as other reasons. Conscientious objectors could be punished only if they had failed to convince the usually generous authorities of the sincerity of their convictions. As for the medical treatment of prisoners, he said that prisons had their own health services and hospitals, but a prisoner's own doctor could also be called in. In the organ-transplant case mentioned by Mr. Pocar, he assumed that any irregularity had been investigated. There was no time-limit for detention on remand. Where mass demonstrations were concerned, it was very difficult to give consideration to the motivations of each individual.

49. Terrorists in prison had a different social standing from other prisoners and were subject to special security measures, but they could have contact with other prisoners. The psychological effects of long detention, however, meant that they must be helped to reintegrate socially.

50. Some might feel that 48 hours of preventive detention without a judicial decision was harsh, but it would be very difficult in practice to reduce it to 12 hours. Concerning prisoners with AIDS, he said that if such a prisoner deliberately infected another prisoner that was clearly an offence and treated as such, but otherwise there was no compulsory detention or treatment.

Right to a fair trial (article 14 of the Covenant) (section IV of the list of issues)

51. The CHAIRMAN read out section IV of the list of issues, namely: (a) the experience in implementing the Law of 19 December 1986 on Combating Terrorism and whether the Law had any noticeable impact on terrorism in the Federal Republic; and (b) progress in reducing the duration of criminal proceedings.

52. Mr. STÖCKER (Federal Republic of Germany), referring to section IV (a), said that it was difficult to know how effective the threat of punishment was, but that a recent report submitted to Parliament had said that the number of criminal acts committed by extreme left groups was currently the lowest since 1980, with a corresponding reduction in personal injury and property damage. One positive development was a drastic reduction in the attack on power lines, which appeared to be the result of a specific law against that.

53. Turning to section IV (b), he said that a new law had been enacted to reduce the duration of criminal proceedings but that the old law could apply for proceedings already under way. The statistics on the length of such proceedings under the new law were still not available but the 1987 statistics showed no significant changes.

Freedom of movement and expulsion of aliens (articles 12 and 13 of the Covenant) (section V of the list of issues)

54. Mr. MEYER-LADEWIG (Federal Republic of Germany) said that in 1987 there had been over 5,000 deportation orders, in 1988 over 7,000 and in 1989 over 9,000. Those figures did not mean that the individuals involved had been expelled to other countries. A deportation order forced an alien legally in the country to leave it if he commited a crime, and expulsion ensued if he ignored the deportation order. Expulsion was also possible if asylum was denied, but recourse to the courts was available. In 1988 103,000 persons had requested asylum and 7,800 had been granted it. In 1989 400 out of 95,000 applicants had been denied asylum but only 200 had been expelled. In the period under review only 1.2 per cent of asylum-seekers had actually been expelled. There were no statistics on how often expulsion had been ordered, but immediate expulsion was exceptional, and an applicant for asylum could turn to the courts or to the European Commission of Human Rights for an extension.

55. As to the rights of aliens against a deportation order or expulsion, he said that since that involved an administrative act, such cases fell within the purview of administrative courts. The alien must be instructed by the authorities as to what steps he could take, and he could have a lawyer. An applicant must be informed of the time-limit for applying for asylum and must be given access to the courts.

56. Mr. ANDO drew attention to paragraph 80 of the report and, referring to the last sentence, asked who judged whether there were good reasons. Were there any relevant legislative or administrative provisions? What was the procedure in case of disagreement? Was judicial review or any other remedy available? Turning to paragraph 99 of the report, he asked for an explanation of what was meant by considerations that were very serious.

57. Mr. FODOR said that in the past year there had been over 1 million asylum-seekers in the Federal Republic of Germany, only a few of whom could be considered political refugees and therefore entitled to asylum, even if many still remained in the country. He therefore wondered what plans the Government had for their eventual repatriation, transfer or settlement, especially in the light of the

(Mr. Fodor)

expected reunification of Germany. It was normal for foreigners with long residence in a country to seek citizenship, but 60 per cent of the foreigners in the Federal Republic had been there 10 years or longer and were still considered foreigners. He therefore wondered how aliens could become naturalized citizens.

58. Mr. MYULLERSON drew attention to paragraph 82 of the report and asked whether a citizen held a passport permanently or whether he required a new one for each trip. Was the passport always with him or was it taken away? And if so, why?

59. Mrs. HIGGINS wondered how the holder of a passport could be prevented from leaving the country, as might be required in the case of criminals. Concerning non-discrimination in respect of alien resident control, she wondered, in the light of article 12 of the Covenant, how a foreign national could be denied the permission to leave the country where public order was not involved.

60. Mr. MEYER-LADEWIG (Federal Republic of Germany), turning to the question of passports and travel documents, said that an identity card alone was sufficient for travel to most countries. A citizen of the Federal Republic could apply for a passport for travel to those countries that required one and must be given one except for the reasons given in paragraph 82 of the report. The border authorities usually provided replacement papers when necessary without any difficulties, except when an individual was trying to escape arrest.

61. He said that passports were issued on request unless there were specific reasons not to issue them, and they could also be withdrawn under specific circumstances. As to the question raised concerning paragraph 82, he said that a passport could be denied not only to prevent avoidance of the payment of taxes and threats to public order but also where violations of foreign-trade laws were involved.

62. The large number of immigrants from the German Democratic Republic were considered German citizens and could enter the country and remain there, but his Government hoped that many would return home as soon as conditions in the German Democratic Republic improved. Eventually those immigrants would be treated like any German changing his residence. There was a problem about granting citizenship to Germans from other Eastern European countries, especially those who had been in the Federal Republic of Germany for a long time. His Government would like them to remain but the country was already densely populated and it therefore sought to stop any further influx and encourage their voluntary return. An alien could become a citizen after eight years, but not all aliens wished to do so and his Government did not want to force them.

The meeting rose at 6.05 p.m.

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SUMMARY RECORD OF THE 965th MEETING

Held at Headquarters, New York,
on Wednesday, 28 March 1990, at 10 a.m.

Chairman: Mr. LALLAH

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The meeting was called to order at 10.10 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (continued)

Third periodic report of the Federal Republic of Germany (continued) (CCPR/C/52/Add.3)

1. At the invitation of the Chairman, Mr. Meyer-Ladewig and Mr. Stocker (Federal Republic of Germany) took places at the Committee table.

2. The CHAIRMAN invited the representatives of the Federal Republic of Germany to offer further clarification and additional information concerning some of the questions that had been raised at the previous meeting.

3. Mr. STOCKER (Federal Republic of Germany), referring to a query concerning the reasons for refusing a foreign national permission to leave Federal Territory, mentioned in paragraph 83 of his Government's report, said that the departure of German citizens was also subject to certain restrictions so that there was no discriminatory treatment. Such measures were taken only in cases where the Government had a claim against either an alien or a citizen for infringement of tax law or foreign trade law. The four types of violations that might give rise to such a measure were mentioned in paragraph 83 of the report. If the presence of a foreigner in the Federal Republic of Germany was deemed necessary in order for proceedings or claims against him to be settled, his departure could be prevented. However, that was done only if no other means was available to the Government for settling the claim. In such cases, a decision to prevent the departure of a foreigner had to be justified in accordance with article 12 of the Covenant.

4. Replying to a question regarding treatment of AIDS victims, he said that the law authorized the health authorities to intervene in cases where there was a danger to public health. It was not the usual practice to arrest AIDS-infected people, but the law could be invoked if they had failed to take the necessary precautionary measures or had violated the physical integrity of others. It then became subject to normal criminal procedures. There was no general practice of detaining persons who had AIDS or of subjecting them to forced treatment.

5. Replying to a question about conditions in psychiatric hospitals, he said that the Bavarian law for sheltering persons who needed psychiatric care had a general clause, which would eventually be introduced into the laws of the other states, stating that psychiatric patients had the right to be treated as sick people and to be cared for with the least possible interference with their personal freedom. Restrictions on that right were governed by concern for the health of the person. The Bavarian law provided for visits by a commission which periodically inspected hospitals. It also gave patients an opportunity to voice complaints. Although there was room for improvement in the treatment of psychiatric patients in other parts of Germany, the laws of the other Länder would eventually be brought into line with the Bavarian standards.

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6. He said that the question whether the conditions in which terrorists were detained were in conformity with the minimum rules applied to other prisoners was academic. The minimum rules were not based on international criteria, and could be applied where appropriate. On the other hand, acts of torture committed by police, guards or fellow prisoners were criminal acts and could immediately be brought before the courts. Those private crimes were not covered under article 7 of the Covenant; rather, they fell within the scope of article 6, on the right to life. The State was under an obligation to take certain measures to protect that right.

Freedom of expression: prohibition of propaganda for war and incitement to national, racial or religious hatred (articles 19 and 20 of the Covenant) (section VI of the list of issues)

7. The CHAIRMAN read out section VI of the list of issues concerning the third periodic report of the Federal Republic of Germany, namely: (a) details concerning prosecutions under paragraph 3 of section 129 (a) of the Criminal Code, and (b) statistics concerning the application of paragraph 1, section 90 (a) of the Criminal Code and illustrations of acts that are deemed to be insulting and deliberately disparaging to the Federal Republic of Germany.

8. Mr. STOCKER (Federal Republic of Germany) explained that paragraph 3 of section 129 (a) of the Criminal Code applied to cases where persons expressed their views through graffiti messages sprayed on walls which, for example, expressed sympathy for the objectives of terrorist organizations. The spraying of graffiti messages was punishable, first of all, because it was a violation of property rights. The question had been raised whether punishment should apply only to the spraying or also to the terrorist message. That depended on the content of the message. In 1984, a Federal court had set a precedent by stating that a charge based on the content must be brought by an observer who was not involved and who considered the message to constitute propaganda for a terrorist organization or an expression of solidarity with a terrorist organization in its struggle against the State or the police. Where the graffiti messages were regarded only as expressions of a humanitarian position, they were not deemed to be in violation of the law.

9. Referring to the application of paragraph 1, section 90 (a) of the Criminal Code and illustrations of acts that were deemed to be insulting and deliberately disparaging to the Federal Republic of Germany, he said that the Criminal Code established a difference between two types of offences. In the first place, a person could be punished for insulting and deliberately disparaging the Federal Republic of Germany or one of the Länder in a public assembly or in writing. Only a small number of such cases had arisen. The Federal Constitutional Court imposed severe restrictions on the application of that paragraph, and usually open and even harsh criticism was viewed as an exercise of the right of freedom of expression. In the last 10 or 15 years, no one had been brought to court for such offences. In the second category were cases where proceedings had been brought under the provision prohibiting anyone from publishing or distributing in writing any insult against the flag or the coat of arms of the Federal Republic or of any Land. That prohibition must be seen in the context of history, inasmuch as the Weimar Republic had suffered constant insults to the colours of the flag. He cited cases tried for

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insults against the flag and the national anthem of the Federal Republic of Germany, noting that the courts had been lenient; in fact the Federal Court had recently suspended sentences in those cases on grounds that they were unconstitutional.

10. Mr. DIMITRIJEVIC said he greatly appreciated the clarification given by the representative of the Federal Republic of Germany, especially with regard to article 90 (a) of the Criminal Code. He was pleased to note that that provision had been interpreted in the courts in a very restrictive manner.

11. He referred to another article of the Criminal Code relating to blasphemy, which was significant from the standpoint of the efforts being made by the Federal Republic of Germany and other countries to delete provisions that were anachronistic in a modern secular State.

12. He would also like to know more about the interpretation given to an article of the Criminal Code which prohibited dissemination of written material insulting a domestically established church or other religious society or community based on a particular world view (Weltanschaungsvereinigung) in a way which was likely to disturb public order. He would like to know what was meant by the expression "domestically established church".

13. He would also like to know whether any attempt had been made to prevent the publication of books like The Satanic Verses by Rushdie, which was considered offensive by Muslims, or whether such an action was currently before the courts. He understood that there had been a case, in the past, relating to the display of a poster stating that the Holocaust had not happened and that it was a Jewish invention. He understood that as a result of that case, legislation had been amended, making it a crime to cast doubt on the authenticity of the war crimes committed during the Second World War. He wondered whether there was a tendency, for historical and civic reasons, to broaden the scope of the concept of "protected truths", and whether there had been any problems in scientific investigation that might be covered by the legislation.

14. Mr. WENNERGREN said he had a question regarding article 17 of the Covenant which was not included in section VI of the list of issues, but was important. It had to do with the subject of interference with privacy. He noted that in the section referring to the census of 1987, the report stated that when preparing for the census, the Federal German legislature had been particularly careful to adhere to those rulings of the Federal Constitutional Court Law granting the right to all persons to determine how their personal data were to be collected and processed by the authorities. The Basic Law did not contain any provisions that referred specifically to the concept of privacy. Article 1 of the Basic Law referred to the dignity of man, and article 2 to the right to the free development of personality. Article 19 provided for certain restrictions of basic rights, and stated that in no case could the essential content of a basic right be encroached upon. The census law was a very delicate piece of legislation, and many persons viewed it with fear and apprehension as an intrusion on their privacy. He wished to know whether the

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Federal Republic of Germany, in adopting the census law, had considered not only the methodology for processing data, but also the scope of the privacy that should be protected.

15. Mr. WAKO expressed his satisfaction at the response given by the representative of the Federal Republic of Germany to the questions regarding article 90 (a) of the Criminal Code.

16. He noted that paragraph 127 of the report, under the section on freedom of religion, stated that the exercise of the rights to freedom of religion and opinion frequently gave rise to problems, since it sometimes conflicted with other protected rights. He would like to have some information about the actual practice of the courts, especially in respect of non-Christian communities, such as Muslims, Baha'is and others.

17. Mr. ANDO said he had some concern regarding the fact that there was a degree of political control over the application of article 10 (2) of the Basic Law. He had in mind the comments on the question of protection of correspondence, in paragraphs 122 and 123 of the report and the statements made in paragraphs 140 and 141 of the second periodic report (CCPR/C/28/Add.6), to the effect that the Federal and Land authorities responsible for the protection of the Constitution, the Armed Forces for Security, and the Federal Intelligence Service might encroach on the privacy of posts and telecommunications for the purpose of averting imminent dangers to the free democratic basic order or to the existence or security of the Federation or Land, and that the orders of the competent Minister were controlled by a body comprising five members of parliament appointed by the Bundestag. While parliamentary control was intended to impose caution in the application of the restrictions, it opened the way to political control. He noted that article 17 of the Covenant stipulated that no one should be subjected to arbitrary or unlawful interference with his privacy; because of the political nature of parliamentary control, he was not sure whether there was a guarantee against arbitrary interference. The matter had been discussed during the Committee's consideration of the second periodic report in April 1986. However, in view of the changes in the political situation since that date, he would like to know whether any change had occurred in the way the law was currently applied in the Federal Republic of Germany.

18. Mr. PRADO VALLEJO, after expressing satisfaction with the replies given by the representatives of the Federal Republic of Germany to the questions under section VI of the list of issues, requested further clarification on two matters. First, he would like to know whether, in view of past history, there were still groups or elements in the Federal Republic of Germany that advocated racial hatred. He knew the Constitution was based on the very important principle that it must prevent the formation of non-democratic parties. He wondered, however, whether there might still be some movements or groups promoting racial hatred, and if so, what had been done about the situation. Secondly, he would appreciate clarification regarding measures taken in cases of non-violent protest, such as political demonstrations. He would like to know whether they were repressed by invoking the Criminal Code and what judicial precedents applied.

19. Mr. FODOR said he understood that organizers of peaceful demonstrations must obtain police permits and must pay a deposit as a guarantee against potential property damage. He would like details on the average and maximum sum of the deposits and whether there were legal remedies if the police denied the permit. If the denial could be appealed to the courts, he wondered if there was a time-limit within which a ruling must be made and if there were legal consequences for holding a peaceful demonstration without a permit. If a permit was denied only because a deposit could not be paid, he wondered whether that provision might be incompatible with rights provided under the Covenant.

20. Mr. STOCKER (Federal Republic of Germany), in reply to Mr. Dimitrijevic, said that faith, conscience and freedom of confession were protected under the Criminal Code. If tolerance was violated by attacks against religious groups and churches, section 166 of the Criminal Code could be invoked, but it did not preclude discussion and even harsh criticism between groups. An insult would have to be very serious for the authors to be prosecuted, and he was not aware of any cases in that respect.

21. With regard to the so-called Auschwitz lie, it was regrettable that, although the facts had been clearly published, people still chose to ignore them. Such claims were punishable under criminal law. Legal action could be taken by the person or persons affected, but legislation had been introduced so that charges could also be brought by the State.

22. The treatment of participants in peaceful demonstrations had been broadly explained in paragraphs 128-137 of the report. Their freedom of expression should not be abused so as to restrict the freedom of movement of third parties. Examples were sit-ins and sit-down strikes which blocked traffic, notably, access to NATO installations. The courts enjoyed some latitude in dealing with demonstrations and were not necessarily bound to bring criminal charges. The Federal Constitutional Court judgement (para. 135) stated that sit-down demonstrations could be punishable if they deliberately prevented others from exercise of their right of freedom of movement. The usual penalties were fines.

23. Mr. MEYER-LADEWIG (Federal Republic of Germany), in reply to Mr. Wennergren, said that protection of information was not specifically provided in the Basic Law, but was interpreted from articles 1 and 2. The Federal Constitutional Court ruled on the extent to which information must be given, and what was then done with it. That issue had played a special role in the recent census. Critics had seen the census as the first step towards the "visible citizen" whose private life would be fully exposed to the authorities. The Federal Constitutional Court had ruled that the citizen was obliged to give information to the census, but that it must be kept confidential. Census information was not available to any other authorities.

24. The special procedures for protection of private communications discussed under article 10 of Basic Law presented some difficulties. There were many safeguards and legal controls, however, and the administrative courts decided whether interference with private communications was justified.

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25. Commenting on Mr. Prado Vallejo's questions, he said that some right-wing extremist groups still existed, though their numbers were diminishing. Leftist extremist groups were more widespread and their membership had risen recently. During the reporting period, 340 cases dealing with rightists had come before the courts, and judgements had been handed down on 183 cases.

26. With respect to the right of freedom of assembly, he pointed out that peaceful demonstrations in the open air did not require a permit, but must be notified to the authorities, which could prohibit or restrict them in the interest of preserving public order. The decision to prohibit was subject to review by the courts within a fixed time-limit. Where there were conflicts of interest, for example, the fears of store owners that demonstrations would reduce sales or of university officials about damage to property, the authorities still gave priority to the right of free assembly. If a prohibited demonstration was held, it could be dispersed and fines could be imposed on the organizers.

Right to participate in the conduct of public affairs (article 25 of the Covenant) (section VII of the list of issues)

27. The CHAIRMAN read out section VII of the list of issues concerning the right to participate in the conduct of public affairs. Speaking in his personal capacity, he asked how frequently employment in the German civil service during the period under review had been denied to applicants who failed to guarantee that they would support the fundamental free democratic order, and what proportion of the total number of applicants for employment that group comprised.

28. Mr. MEYER-LADEWIG (Federal Republic of Germany) said that he had no precise statistics on the number of persons refused civil service employment because of disloyalty to the democratic order of the State but he could report that in Baden-Wurtenburg, two applicants had been refused out of nearly 30,000, and in Lower Saxony, 25 had not been hired out of 32,000 applications. In the State railroad and postal system, no applicant had been denied employment for those reasons since 1986. The easing of East-West tensions would have a salutary effect on the hiring of persons for public service.

29. Mr. MYULLERSON said that exclusion from certain occupations for political reasons, as mentioned in paragraphs 37 through 40 of the report, was difficult to accept in the light of human rights standards. In the past, human rights issues had been used for political purposes, but that ploy was losing its relevance in the light of recent events. He asked for clarification of the meaning of "extremist" as used in paragraphs 37 and 38. He wondered whether it applied to ideas expressed or whether those ideas would have to be demonstrated in action, such as terrorism. He also wondered whether Communist Party membership was defined as left-wing. He would welcome information of decisions on the Constitutional Court which clarified the definition of extremism.

30. Ms. CHANET noted that paragraph 32 of the report specified that membership in the Communist Party was a barrier to employment in public service. She inquired how that would be viewed in the light of reunification, since many of the civil servants in the German Democratic Republic had been Communist Party members. She wondered if the provision would be made retroactive, and if they would be required to renounce party membership.

31. Mr. POCAR wished to gain a better understanding of the legal basis for the demand of loyalty from civil servants. Referring to article 33 of the Basic Law, he said that only indirectly could such a condition be found. Apparently, the legal basis lay in interpretations by the Federal Constitutional Court. He asked about the discretionary powers of the authorities and how the judicial powers were monitored, and what recourse was available for appeal of such decisions. It would be useful to know how the conditions prohibiting employment were verified, and whether the burden of proof lay with the applicant or the administration. Loyalty or disloyalty would be difficult to prove in any case, unless membership in a certain party or group could be claimed. He also wanted to know how party financing was provided, whether through both public and private funds, or public funds alone.

32. Mrs. HIGGINS said that the reporting State should be more specific about the prerequisite for qualification referred to in paragraph 36 of the report which had been altered in scope and no longer applied to certain categories of public servants. The paragraph implied that the compatibility of the loyalty oath with international agreements had been confirmed by two judgements handed down by the European Court of Human Rights. However, those two cases were relevant only to article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and did not address the issues raised under article 25 of the International Covenant.

33. The CHAIRMAN said that, as a follow-up to the question raised earlier by Ms. Chanet, he wondered what the impact of reunification would be on those individuals who were currently members of the Communist Party in the German Democratic Republic.

34. Mr. MEYER-LADEWIG (Federal Republic of Germany) said that in his country a public servant was expected to uphold the basic rights and values of the State. Otherwise, the State had the right to reject the applicant for employment in the public service.

35. The basic issue was whether the Government was under an obligation to employ an individual who did not support the order of the State. The opinion of his Government, which was based on a 1975 ruling of the Federal Constitutional Court, had not altered since its initial report to the Committee. At the same time, the situation had changed and, in practice, the principle was not always applied.

36. The requirement to uphold the "fundamental free democratic order" meant that an applicant for the public service was free to criticize the State and work for change within the existing constitutional framework. Public servants had to have a positive view of the State and the Constitution and to demonstrate that attitude in

(Mr. Meyer-Ladewig, Federal Republic of Germany)

the fulfilment of their duties. The decision to accept or reject an applicant for employment in the public service was made either by the State or by the communal authorities. In making such a decision, the authority had to take into consideration all the factors involved. Under its 1975 ruling, the Federal Constitutional Court had said that one important factor was whether doubt existed with respect to the applicant's loyalty to the Constitution. The Federal Constitutional Court and the European Court of Human Rights had been called in on occasion to review decisions under which an applicant had been rejected and, in some cases, those decisions had been overturned.

37. He fully agreed with the point raised by Mrs. Higgins with respect to the loyalty oath. In confirming the Federal Republic of Germany's view, the European Court of Human Rights, had on the basis of its article 10, held that there had been no violation of the right to freedom of expression. He agreed, however, that article 25 of the Covenant raised different issues.

38. Thorough consideration had not yet been given to all the implications of reunification. Having demonstrated its desire to have a State based on democratic rights, the German Democratic Republic would surely continue to promote democratic development and human rights.

39. The Government of the Federal Republic had recently made some changes with respect to funding procedures for political parties. Parties could obtain funding from the Federal states, membership fees and fund-raising activities. Political parties were under an obligation to disclose the sources of their funds.

40. Mr. POCAR said that the Federal Republic of Germany had submitted an excellent report, which had closely followed the guidelines set out by the Committee. According to paragraph 152 of the report, no reference had been made in the report to certain articles of the Covenant because the Government had reported on those issues in the context of its special obligations under other international treaties. He wished to point out that a State's obligation to submit reports to other treaty bodies did not exempt it from its obligations under the International Covenant.

41. While it had clearly given consideration to the treatment of detainees, the State party needed to continue its efforts in that area. Similarly, the decision not to ratify the Optional Protocol continued to be of concern to the Committee.

42. Mrs. HIGGINS said that the report was of a high quality and had combined theory and practice, as requested in the guidelines. The tenor of the dialogue with the members of the Committee had been a model for a third periodic report. Furthermore, she appreciated the frankness of the State party's responses.

43. The Committee's procedure was to base its discussion on the list of issues. Within that framework, additional questions drawing on the broad experience of the Committee members were encouraged. She wished to emphasize that at no time did the dialogue with any State party imply any sort of accusation.

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44. During the dialogue, she had occasionally had the impression that not enough attention was being paid to the International Covenant. For example, while she had appreciated the additional information provided on the freedom of foreigners to leave the country, the examples given seemed not to be fully relevant.

45. The State party had provided a clear explanation for the fact that propaganda supporting terrorism was a violation of the Criminal Code. Yet, at the present juncture in its history, the Federal Republic of Germany had to maintain a delicate balance between past experience and future prospects. Both orientations had implications for human rights. With respect to self-determination, the emphasis should be on the future. The balance was problematic and she would watch with interest to see how the State party handled the situation.

46. It was her view that minorities were not limited to the three categories mentioned in article 27 of the Covenant. She agreed with the State party that foreigners, per se, did not constitute a minority group.

47. Mr. PRADO VALLEJO said that he was grateful to the representatives of the Federal Republic for their comprehensive and objective answers. He also wished to stress the spirit of co-operation that had been amply demonstrated during the consideration of the report. While there was generally speaking a sound mechanism for the protection of human rights in the Federal Republic of Germany, some concerns remained. Prolonged solitary confinement for individuals considered to be terrorists was problematic not only in terms of the International Covenant but also in terms of conditions of treatment of the detainee. In certain cases, Länder legislation on human rights issues needed to be brought into line with federal legislation. Lastly, it was his hope that the Federal Republic would ratify the Optional Protocol.

48. Mr. MYULLERSON said that he had appreciated the concise report and competent responses of the State party. Like the previous speaker, he was concerned about the solitary confinement of detainees and about preventive detention and other procedures under the Criminal Code. While some of those procedures had sound objectives aimed at protecting human rights, they could also be used to restrict the freedom of expression. Lastly, he also had reservations about the procedure of barring certain individuals from public service.

49. Mr. EL-SHAFEI said that the third periodic report was a model report providing comprehensive information. However, he had reservations about certain points.

50. The question of legislation governing the constitutionality of political parties and the implementation of article 22 of the Covenant should be left to the voters themselves, who would choose the parties that represented them. The legal obligation to uphold the constitution, binding on civil servants as a qualification for employment was not compatible with article 25 of the Covenant. Lastly, he also had reservations about the length of pre-trial detention and some prison conditions.

51. Mr. WAKO said that there had been a very constructive dialogue between the Committee and the reporting State. The third periodic report and the introductory statement had been outstanding. He appealed to the State party to reconsider its position concerning the Optional Protocol in order to enhance the protection of human rights. The negative example set in that regard by the Federal Republic of Germany, which was a leading democratic country, might induce other countries not to ratify the Optional Protocol or even the Covenant. He was also concerned about the reporting State's restrictive interpretation of articles 12, 13, 22, 25 and 27 of the Covenant. Nevertheless, it seemed to be aware of the dangers inherent in that approach and sought to apply the pertinent legislation in a very balanced manner.

52. Mr. FODOR said that he was very satisfied with the information provided both in the report and orally by the representatives of the State party. Although human rights were scrupulously implemented in the reporting State, he was none the less concerned about the excessively long periods of pre-trial detention, the duration of some criminal procedures, certain aspects of detention conditions and restrictions placed on the freedom of movement of some groups of foreigners.

53. Mr. WENNERGREN said that there had been a very fruitful dialogue with the reporting State, which had demonstrated its willingness to protect human rights and comply with the provisions of the Covenant. On the other hand, he did not fully understand why the State party was reluctant to accede to the Optional Protocol, inasmuch as some of its provisions were not covered by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The practice of holding prisoners in solitary confinement for long periods came quite close to inhuman treatment within the meaning of article 7 of the Covenant. In certain cases of preventive detention, persons did not have the opportunity to be brought before a judge until the day after their arrest. That lapse of time was too long and was at variance with the requirement laid down in the Covenant. Lastly, the practice of making loyalty to the Constitution a condition of employment in the civil service was not in accordance with article 25 of the Covenant.

54. Mr. NDIAYE expressed satisfaction at the very precise answers provided by the delegation of the reporting State to the questions raised. He felt that the State party should accede to the Optional Protocol because it provided the best instrument for monitoring the implementation of the Covenant.

55. Mr. MAVROMMATIS said that the third periodic report, in form and content, was a model for States parties. He found the reasons for the reporting State's reluctance to accede to the Optional Protocol unconvincing and hoped it would reconsider its position in that regard. In general, there had been a very constructive dialogue and the reporting State had demonstrated its commitment to promoting and protecting human rights.

56. Mr. ANDO expressed satisfaction with the model report submitted by the State party and the precise answers provided by its delegation to the questions raised. He felt that greater attention should be given to the question of protecting the rights of foreign workers. It was hoped that the views of the Committee would be given further consideration and generally publicized in the country.

57. Mr. AGUILAR said that he was very satisfied with the report of the State party and the answers provided to the Committee. Nevertheless, he felt that the Federal Republic of Germany should ratify the Optional Protocol in order to provide greater protection for human rights. Further consideration should be given to the question of requiring the loyalty of civil servants to the Constitution as a condition of employment. After unification, many civil servants who had been members of the Communist Party in the German Democratic Republic might lose their jobs. Lastly, he found the Federal Republic's definition of minorities unduly restrictive.

58. Ms. CHANET said that while the third periodic report was excellent and provided comprehensive information, a number of questions, gave rise to concern. She hoped that the delegation of the reporting State would inform its Government of the need to ratify the Optional Protocol in order to strengthen its protection of human rights. The question of the place of the Covenant in domestic legislation had not been sufficiently clarified. The restrictions placed on freedom of movement were not compatible with article 12 of the Covenant. The question of the maximum security detention régime for certain terrorists should be considered further. Lastly, she felt that the requirement of loyalty to the Constitution as a prerequisite for employment in public service was not in keeping with article 25 of the Covenant.

59. Mr. COORAY said that the Committee had had a very constructive dialogue with the reporting State, which had clearly demonstrated its commitment to the protection and promotion of human rights.

60. The CHAIRMAN, speaking in his personal capacity, said that the reporting State had submitted an excellent report and that the dialogue between its representatives and the Committee had been extremely useful. Much progress had been made in implementing the Convention since the consideration of the two previous reports. In general, he urged the State party to view the Covenant as a valuable human rights instrument in its own right.

61. Mr. MEYER-LADEWIG said that he had found the dialogue with the Committee very profitable. The views and concerns put foward by the Committee would be conveyed to the proper authorities in his country.

The meeting rose at 1.20 p.m.

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HUMAN RIGHTS COMMITTEE

Thirty-eighth session

SUMMARY RECORD OF THE 966th MEETING (CLOSED)

Held at Headquarters, New York,
on Wednesday, 28 March 1990, at 4.30 p.m.

Chairman: Mr. LALLAH

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Consideration of communications under the Optional Protocol to the Covenant (continued)

* All persons handling this document are requested to respect and observe its confidential nature.

N.B. This record is subject to correction. Participants wishing to submit corrections during the session of the Committee are asked to hand them, in typewritten form, to the Secretary of the Committee. A consolidated corrigendum of the summary records covering the closed meetings of the Committee will be issued shortly after the session.

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The meeting was called to order at 4.45 p.m.

CONSIDERATION OF COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE COVENANT (continued)

Communication No. 205/1986 (CCPR/C/WG/38/DR/205/1986)

1. Mrs. HIGGINS, speaking as Chairman/Rapporteur of the Working Group on Communications, said that the authors were three leaders of an Indian tribal society who had alleged a violation of article 1 of the Covenant.

2. The authors stated that, from time immemorial, they had been a free and independent nation and had concluded treaties with the French and British colonial authorities, which guaranteed their separate identity and their hunting, fishing and trading rights. They claimed that their territory had never been part of Europe's American colonies but had always been a distinct commonwealth under the British Crown, and that no right to self-determination had been extinguished as a result of dealings between Canada and the Crown. Therefore, their land must be considered a Non-Self-Governing Territory within the meaning of the Charter of the United Nations. The authors believed that, by virtue of General Assembly resolution 1514 (XV), they had the right to self-determination, which could be exercised in various forms, including association or federation with an existing State.

3. They claimed that, in its Constitution Act 1982, Canada had "recognized and affirmed" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada" and that the specification of such "existing" rights must be negotiated with the indigenous representatives "invited" for that purpose by the Prime Minister of Canada. While such meetings had been held, the authors stated that their request to participate had been denied on the grounds that other "Indians" could negotiate their future political status, and that they had found that arrangement inconsistent with their right to self-determination. The authors stated that no domestic remedies could be pursued, since participation in the negotiation of indigenous peoples' political status was entrusted to the discretion of the Prime Minister, and that Canadian law afforded no means of challenging his decision other than by appealing to him personally; that, they stated, had been done, but unsuccessfully.

4. The Committee had transmitted the communication under rule 91 of the rules of procedure to the State party concerned. On 9 February 1987, the State party had objected to the admissibility of the communication on the grounds that: first, self-determination could not be invoked in circumstances which would prejudice the national unity and territorial integrity of a sovereign State, and the communication should therefore be declared inadmissible ratione materiae under article 3 of the Optional Protocol; secondly, the tribal society did not constitute a "people" within the meaning of article 1 of the Covenant because it was a scattered group; thirdly, the right to self-determination was a collective right and was not available to an individual; fourthly, international law and Canadian domestic law did not recognize Indian treaties as international documents; fifthly,

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the constitutional conference did not deal with the right to self-determination, and the communication was incompatible ratione materiae with the provisions of the Covenant in that regard; and, sixthly, the authors of the communication had not exhausted all the domestic remedies available to them. The State party claimed that, when the Supreme Court of Ontario had rejected an application by the Prairie Treaty Nations Alliance for a mandatory order that they be invited to the constitutional conference, the authors chose not to appeal that judgement, although they could have done so.

5. Commenting on the State party's submission, the authors had contended that their allegations with respect to the violation of article 1 were well founded, and had further asserted that the State party had violated article 25 of the Covenant, and had requested interim measures. The authors asserted that their tribal society was proposing an alternative form of federalism and asserting its right to self-determination in a manner consistent with the national unity of Canada. With regard to the State party's claim that the tribal society did not constitute a "people" within the meaning of article 1 of the Covenant, the authors asserted that the State party had referred to Indians as peoples in certain United Nations bodies. The authors further reiterated their view that the right to self-determination had an individual dimension and that it was an individual right exercised through collective means.

6. The authors rejected the Canadian Government's assertion that the constitutional conference and the proposed constitutional accord with Canada's "aboriginal peoples" did not affect their tribal society's rights under article 1 of the Covenant, and expressed the view that the Canadian constitutional-accord process violated article 25 of the Covenant in so far as it was non-representative and deprived a particular racial, ethnic or national class of persons of the right to participate meaningfully in decisions directly affecting them. Finally, the authors asserted that they had complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol, and pointed out that that provision did not require the exhaustion of every possible remedy, only a reasonable effort to pursue remedies which were effective and available.

7. In a further submission dated 18 May 1987, the authors informed the Committee that the final constitutional conference between the Government of Canada and selected indigenous organizations had met on 26 and 27 March 1987 but had not reached any agreement. As there was no constitutional authority to convene any further conferences, the authors claimed that there was greater need than ever to declare that no legislation affecting the political status of their tribal society within Canada should be adopted without prior negotiations with that society.

8. By an interim decision of 20 July 1987, the Working Group had requested the State party to provide the text of the judgement of the Supreme Court of Ontario in the action brought against it by the Prairie Treaty Nations Alliance. In a submission dated 10 August 1987, the authors stated, with respect to the issue whether a Canadian court could have directed the Prime Minister to invite representatives of their people to participate in the constitutional conferences, that decisions entrusted to a minister by Parliament could be reviewed by the

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courts only to the extent that, in exercising his discretion, the minister disregarded explicit parliamentary instructions; however, the reasonableness or fairness of his decisions were not subject to review.

9. In a submission dated 7 October 1987, the State party claimed that, with respect to the authors' claim that the constitutional-accord process violated article 25 of the Covenant, no evidence or explanations had been put forward to support that allegation and that, accordingly, the communication should be declared inadmissible as being an abuse of the right of submission. Further, the State party argued that the authors could not be considered "victims" within the meaning of article 1 of the Optional Protocol and that what they were seeking amounted to a declaration on the possible implications and administration of future, but currently non-existent, legal provisions.

10. With respect to the exhaustion of domestic remedies, the State party submitted that the timing of the constitutional conferences in 1984 and 1987 had been known since the adoption of the Constitutional Amendment Proclamation in March 1983, and affirmed that the obligation to take appropriate legal proceedings in the domestic courts implied a responsibility to seek domestic remedies in a timely way. Finally, the State party disputed the authors' argument that decisions of Cabinet ministers were only subject to review in exceptional circumstances.

11. In a submission dated 14 February 1988, the authors referred to a written offer made by the Minister for Indian Affairs and Northern Affairs on 10 August 1987 to discuss the authors' status in a non-constitutional framework. In a submission dated 10 February 1989, the authors' counsel recalled that the Supreme Court of Canada, in 1985, had ruled favourably on the validity of the 1752 Treaty of Halifax and that, in the light of that decision, the authors had proclaimed general hunting and fishing regulations for their tribal society. Despite the Supreme Court ruling, members of their community had been arrested and prosecuted for hunting and fishing contrary to federal and provincial regulations.

12. In a submission dated 26 July 1989, the State party denied that the charges against one of the members of the tribe who had been arrested and tried related to a violation of hunting or fishing laws.

13. In paragraph 14.1 of the proposed decision on admissibility (CCPR/C/WG/38/DR/205/1986), the Committee stated that, before considering any claims contained in a communication, it would, in accordance with rule 87 of its rules of procedure, decide whether or not it was admissible under the Optional Protocol. In paragraph 14.2, the Committee observed that, while article 1 of the Covenant recognized and protected a people's right to self-determination and its right to dispose of its natural resources, that provision could be invoked neither by individuals nor by peoples under the Optional Protocol, and it referred to earlier case law on the matter.

14. In paragraph 15.1, the Committee stated that the Optional Protocol did not preclude a group of individuals who claimed to be similarly affected from collectively submitting a communication about alleged breaches of their rights as

set out in part III of the Covenant and that the authors had asserted that the fact that their tribal group had been excluded from participating in the constitutional conferences also revealed a breach of article 25 of the Covenant.

15. There were two alternatives for the remainder of the paragraph. Alternative 1 stated that the authors' assertion had not been substantiated and therefore did not give rise to a claim within the meaning of article 2 of the Optional Protocol. In alternative 2, the Committee observed that the question as to whether constitutional conferences constituted "the conduct of public affairs" within the meaning of article 25 (a) of the Covenant was an issue which should be examined on the merits.

16. In paragraph 15.2, the Committee stated that the authors' most recent allegations of violations of article 9 of the Covenant were far removed from the issue and could not be considered as giving rise to a claim within the meaning of article 2 of the Optional Protocol.

17. There were two alternative versions of paragraph 15.3; in the first, the Committee decided that the communication was inadmissible, and, in the second, it decided that the communication was admissible in so far as it might raise issues under article 25 (a) of the Covenant.

18. The CHAIRMAN, speaking in his personal capacity, said that he had always assumed that article 25 (a) referred to representation in institutions, either directly or through freely chosen representatives; he saw no possibility that the "conduct of public affairs" could be interpreted as including arrangements for local or provincial government. He therefore considered that the claim of a violation of article 25 (a) was not substantiated, although he would be interested in knowing what the travaux préparatoires said.

19. He did not fully understand the authors' claims of a violation of article 9 of the Covenant, and wondered what issue could possibly fall under that article on the basis of the authors' allegations, assuming that they were accepted.

20. Mrs. HIGGINS, referring to paragraphs 11.2 and 11.3, said that fishermen of the tribal society caught harvesting fish in waters adjacent to Indian reserve lands had been found guilty and their appeals were pending. While the Federal Government had not challenged the validity of the treaty which had been invoked by members of the tribal group, it argued that the treaty did not apply to Cape Breton Island. The authors had claimed that the prosecutions constituted an abuse of legal process in violation of article 9. None of the members of the Working Group had felt that that claim carried any weight and it had therefore been rejected.

21. The CHAIRMAN said that any issue raised under article 1 of the Covenant should be dealt with under article 27.

22. Mrs. HIGGINS said that the key issue had been the Constitutional Act. The Federal Government had organized a large conference in order to render specific the recognized aboriginal claims. Because there were about 350 separate bands, the

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Government had decided that participation in the conference should be limited to representative groupings, and it had not invited the tribal group represented by the authors. The authors had claimed that the Government's refusal to allow them to participate in the conference violated either their right to self-determination or their right under article 25 (a) of the Covenant.

23. The CHAIRMAN said that there would still be no question of a violation under article 25 (a). The constitutional conference did not involve bilateral negotiations between two separate sovereign entities. It was an internal agreement and fell under the jurisdiction of Canadian courts of law.

24. Mr. DIMITRIJEVIĆ said that, although he could accept either alternative version of paragraph 15.3, he would prefer alternative 2, since the Committee could not simply dismiss the claim under article 25 (a) simply by stating that it had not been substantiated. He agreed with the Chairman that the constitutional conference was not a constitutional assembly. Under Canadian law, it was within the discretionary power of the Prime Minister to select the most representative groups.

25. In his opinion, article 25 (a) was not applicable; the Committee should provide a better explanation of why it considered that the communication might raise issues under article 25 (a). If the Committee agreed on alternative 2, it could decide to invite the State party to present its views on article 25 (a), and then the Committee could proceed to a decision on the merits.

26. Mr. MAVROMMATIS said that he did not believe that non-participation in an internal arrangement was or could be a violation of article 25 (a), and there was no need for explanations. The Committee should straightforwardly present its view of the matter.

27. In paragraph 15.1, the Committee's reference to a group of individuals "collectively submitting" a communication might be interpreted as a sanctioning of some sort of actio popularis. Although the word "collectively" was technically correct, the Committee should not give the impression that the claim involved a whole band or a whole people.

28. Mr. WAKO, agreeing that the issues were not to be confused with those in the Lake Lubicon case, said that, like Mr. Dimitrijević, he would opt for admissibility under article 25. The constitutional conferences, even if advisory, had been meant to decide the rights of the indigenous peoples of Canada and thus were important; and the indigenous peoples had the right to have some say in the matter either by direct participation or through elected representatives.

29. He read out passages from the travaux préparatoires for article 25 (a) showing that at the time States had been divided as to whether it should be interpreted widely or strictly; and observed that the Working Group had similarly fallen into two camps. He advocated declaring the communication admissible under article 25 (a), so that both parties could be heard on the merits.

30. Mr. POCAR observed that the case was more difficult than had appeared at first sight. Although it had one issue in common with the Lake Lubicon case, it was not at all similar and the Committee's decision in the latter would be of no assistance. The travaux préparatoires also shed very little light on the article 25 issues. Since he himself had not yet read the communication carefully as to the facts, he was not in a position to give an opinion on the applicability of article 25 (a). Therefore, if he had to opt now for one of the two alternatives in the conclusion to paragraph 15.1 of the proposed decision, he would support alternative 2 in fairness to the victims, since it left the matter open. Nevertheless, he had reservations about the wisdom of invoking article 25 (a), since it might raise an issue where none existed and give unfounded expectations to the authors. Personally, he would like more time to study the matter, but would not oppose an emerging consensus.

31. Mr. COORAY concurred with Mr. Pocar as to the need for more time and the position he would take if pressed to decide now.

32. Mr. EL-SHAFEI said that the time had come for a decision. The authors had made their position very clear and he sympathized with their argumentation regarding the points raised by the State party. The only possible topic of discussion at a constitutional conference between the Government of Canada and organizations of indigenous peoples would be the relationship between the two, and it must touch on the constitutional position of those peoples vis-à-vis the federal system as a whole. To his mind, the communication was admissible and, in fact, the Committee should say only that, without pre-judging its future position by referring solely to article 25 (a).

33. Mr. WENNERGREN pointed out that the State party itself described the constitutional conference as a "domestic political process" (para. 9.1 of the proposed decision) - in other words, an ad hoc formation intended to make possible an exchange of views within the framework of domestic politics. That was close to the "conduct of public affairs" in article 25 (a), and it therefore looked like an issue that might be raised under that article.

34. Mrs. HIGGINS said that the Committee could either take no decision at the moment or find the communication admissible, which would give it more time for further thinking on the matter. Either way, she believed that certain amendments to the text of document CCPR/C/WG/38/DR/205/1986 were in order. In paragraph 15.1, taking Mr. Mavrommatis' objection into account, the words "collectively submitting" should be replaced by the words "together submitting". Alternative 1 for the continuation of paragraph 15.1 should be reworded entirely so that it read: "However, the constitutional conference concerns not the conduct of public affairs but the rendering specific of aboriginal rights and, therefore, no issue arises under article 25."

35. Alternative 2, which would make the case admissible, should include not only a reference to the applicability of article 25 (a) to the constitutional conferences but also a reference to the reasonableness of the Government in excluding the Indian tribal society. Thus, after the phrase "within the meaning of

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article 25 (a) of the Covenant", the clause "and, if so, whether the exclusion of the ... Band violated article 25 of the Covenant" should be inserted.

36. Mr. WENNERGREN observed that since the Indian tribal society was referred to in the first sentence of paragraph 15.1 as a "group of individuals", the reference to it in the amendment to alternative 2 as the "... Band" should at least be put in quotation marks.

37. He noted further that the State party had contested the authors' position on the exhaustion of domestic remedies (para. 9.3 of the proposed decision), maintaining that they could have asked for review of the Prime Minister's discretionary decision or instituted timely proceedings, years earlier, to secure a seat at the constitutional conference. That too should be mentioned in alternative 2.

38. Mr. NDIAYE said that assessing the powers of the constitutional conference as such would be a minor matter but that the question of participation in that particular constitutional conference was extremely important. It should be recalled that often, in other settings, colonial councils had provided the framework within which indigenous peoples had obtained rights and prerogatives, and the same might have happened in the case under consideration. He needed more time to give careful study to the scope of article 25. At any rate, it was not a proper assessment of the situation to say that since only consultative powers were at issue, they were unimportant and did not constitute the conduct of public affairs.

39. Mrs. HIGGINS said that under no circumstances should there be any overtone of the issues not being important. Article 25 of the Covenant was not couched in terms of importance or otherwise, and indeed many issues were crucial but did not fall within the scope of that article.

40. For her, the issue was narrow. Either it concerned how public affairs were conducted, or it concerned the rendering specific of aboriginal rights (rights like fishing and hunting that were very important). However, she could see both sides.

41. Mr. MAVROMMATIS, reiterating that the case had dragged on far too long, especially when all members of the Committee knew what the end result would be, said that he did not think, given his views, that it would be proper for him to take part in any decision on the merits.

42. In any case, the Committee should not lose sight of the original allegations, which concerned property rights, and the nature of the constitutional conference, the latter being an advisory meeting that could never, in his view, come under article 25. He noted further that article 25 was intended to protect individuals. The rights of bands and indigenous peoples were covered by other articles.

43. He did not think that the Committee should raise false hopes. Nor, more importantly, should it create the impression that its members were seeking to become legislators through judicial decisions that gave wide interpretations.

44. The CHAIRMAN, speaking in his personal capacity, asked what remedy the Committee could ever ask the State party to give, if the constitutional conferences were over.

45. Mr. MÖLLER (Representative of the Secretary-General) said that since the conferences had ended inconclusively, the issue could be considered moot. The authors had, indeed, wanted a decision in the past, at the relevant time.

46. Mr. DIMITRIJEVIĆ asked Mrs. Higgins to come back to the Committee with more polished versions of the two alternatives in paragraph 15.1, including also the point just made by Mr. Mavrommatis that article 25 of the Covenant governed individual rights and not the rights of the whole group, as in article 1.

47. Mrs. HIGGINS agreed to do so and said that she would also include in alternative 2 the point regarding local remedies brought up by Mr. Wennergren.

The meeting rose at 6 p.m.